Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether civil actions under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, are subject to the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Crown Cork & Seal Company, Inc. ("Crown") and respondent United Steelworkers of America, AFL-CIO-CLC (the "Union"), the Chamber of Commerce of the United States of America appeared in the Court of Appeals as *amicus curiae* in support of Crown. Crown has no parent company. Crown subsidiaries (other than wholly owned subsidiaries) are Crown Cork Company (Belgium) N.V., Crown Can Hong Kong, Ltd., The Crown Cork Company (East Africa) Ltd., Crown Cork del Peru, S.A., Crown Cork & Seal (Thailand) Co., Ltd., Emirates Can Company, Ltd. (Dubai, UAE), Crown Cork Company (Zambia) Limited, and Crown Cork Company (1958) (Pvt) Limited.

In the Court of Appeals, this case was consolidated with *Thomas v. North Star Steel Co.*, No. 93-7613, in which the following parties appeared: Charles A. Thomas, Darren Boop, Robert W. Bower, William D. Bridge, James Clingan, Neal B. Housner, Jonathan L. Noaker, Wayne D. Orner, Gerald W. Ranck, Harold E. Van Sickle, Jr., Richard A. Winter, Eugene L. Witmer, Sr., North Star Steel Company, and, as *amici curiae*, the Chamber of Commerce of the United States of America; the Oil, Chemical and Atomic Workers International Union; the United Mine Workers of America; the NLG/Sugar Law Center for Economic & Social Justice; and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.

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OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra,* 1a-16a) is reported at 32 F.3d 53. The opinion of the District Court on the merits (App., *infra,* 17a-23a) is reported at 833 F. Supp. 467, and its order certifying the legal issue for immediate appeal under 28 U.S.C. § 1292(b) (App., *infra,* 24a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, which is reproduced in full in the Appendix (App., *infra,* 25a-33a).

STATEMENT

A. Statutory Framework

Congress enacted the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. §§ 2101-09, in 1988 to provide unions, employees and local governments with advance notice of impending plant closings and mass layoffs. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a). The WARN Act generally requires employers to provide sixty days' notice of a mass layoff or plant closing to affected employees (or their union representative) and to the local government. *Id.* The notice period may be reduced if, for example, a mass layoff or plant closing results from unforeseeable business circumstances or from a natural disaster, or if an employer had been seeking business or capital to avert the closing or layoff. 29 U.S.C. § 2102(b).

A statutory plant closing or mass layoff occurs where a minimum number of employees suffer an "employment loss" within a 30-day (or in some circumstances 90-day) period. 29 U.S.C. §§ 2101(a)(2)-(3), 2102(d). The WARN Act defines "employment loss" as a termination, a layoff exceeding six months, or a 50% reduction in work hours for each month of a six-month period. 29 U.S.C. § 2101(a)(6). Hence, affected employees will be aware of a possible WARN Act claim no later than six months after a plant closing or mass layoff.

The WARN Act creates a private cause of action for employees and their union representatives, who can sue an employer for statutorily-specified money damages in any district where the employer transacts business. 29 U.S.C. § 2104. The Act, however, does not specify the

statute of limitations that governs such claims. Accordingly, under the WARN Act, there is a need to borrow a limitations period from elsewhere.

B. Facts and Proceedings Below

On or about September 30, 1991, Crown ordered a layoff at and shutdown of its unionized manufacturing plant in Perry, Georgia. As a result, Crown laid off approximately eighty-five Union-represented employees at the plant. The Union alleges that Crown failed to provide it with 60 days' advance notice of this action. The Union, however, waited until October 15, 1992, more than a year after the shutdown, to file suit against Crown. The Union did not file suit in Georgia, where the shutdown occurred, but instead chose to sue in the United States District Court for the Eastern District of Pennsylvania.[1]

Crown moved for summary judgment on the ground that WARN Act claims were subject to the six-month statute of limitations borrowed from Section 10(b) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 160(b), and that Union's suit was therefore time-barred.

Although the District Court acknowledged that "there are cases going both ways on the question of whether state law or § 10(b) of the NLRA provides the appropriate limitations period for a civil suit under WARN," it ruled that a Pennsylvania state limitations period governed the Union's WARN Act claim (App., *infra*, 21a-22a). However, the Court declined to decide which Pennsylvania limitations period applied (*id.* at 22a), perhaps because it could not identify any Pennsylvania statute that was even remotely analogous to the WARN Act. The district court then certified its decision for immediate appeal (*id.* at 24a).

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[1] The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 2104(a)(5).

The United States Court of Appeals for the Third Circuit affirmed (App., *infra,* 1a-16a). The Court reached this result even though it recognized that the NLRA, like the WARN Act, required an "employer [to] provide notice [of plant closings] to represented workers," and that the WARN Act "has a family resemblance to the NLRA" (*id.* at 10a). Moreover, the Court of Appeals affirmed even though it found that none of four Pennsylvania limitations periods suggested by the plaintiffs "provide perfect analogies to WARN," and even though it refused to decide which of at least four possible state limitations periods applied (*id.* at 15a-16a).

The Court of Appeals also acknowledged that WARN Act claims would likely be governed by a limitations period from the forum in which employees filed suit, and that, in this case, the Union opted to sue in Pennsylvania for an alleged violation which occurred in Georgia (*id.* at 14a n.4). Nonetheless, the Court downplayed the risk of forum shopping created by its refusal to adopt a uniform limitations period. And, despite the fact that the limitations period could vary from at least two to six years in Pennsylvania (*id.* at 15a) to as much as twenty years in Georgia, *see* Ga. Code Ann. § 9-3-22 (twenty-year limitations period for claim under statute), the Court of Appeals asserted that " 'workers will gain few advantages by suing in a court far from the site of injury' " (*id.* at 14a) (quoting *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 56 (2d Cir. 1993)).

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve an important and recurring question of federal labor law that, despite exhaustive briefing in four Circuits, has deeply and irreconcilably split the Courts of Appeals. The court below aligned itself with the United States Court of Appeals for the Second Circuit in holding that WARN Act claims should be governed by state limitations periods. (App., *infra,* 16a); *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 57 (2d Cir. 1993).

These holdings and their underlying rationales conflict with and have been expressly rejected by decisions of the United States Court of Appeals for the Sixth Circuit in *United Mine Workers of America v. Peabody Coal Co.*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994) and the United States Court of Appeals for the Fifth Circuit in *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *reh'g en banc granted,* 1994 WL 520351 (5th Cir. Sept. 22, 1994). Both the Sixth and Fifth Circuits held that WARN Act claims were governed by the six-month limitations period of Section 10(b) of the NLRA, because the NLRA offers the *only* close analogy to the WARN Act in state *or* federal law, and because a uniform federal limitations was needed to avoid uncertainty, forum shopping, and costly collateral litigation. *See Peabody Coal,* 1994 WL 590188, at *7; *Halkias,* 31 F.3d at 235-38. Because resolution of this circuit split will likely have retroactive effect, *see, e.g., Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993), substantial benefit would be gained from prompt review by this Court.

This Court should also grant review to make unmistakable the process by which the lower federal courts determine whether to borrow a limitations period from state or federal law. This Court has held that a court must consider *both* state and federal statutes to determine which provides a better analogy to the cause of action at issue, but lower courts have not consistently applied this analy-

sis. For example, in this case, the Third Circuit refused to borrow a limitations period from the NLRA because, in its view, the NLRA was not a sufficiently perfect analogy to the WARN Act. The Third Circuit reached this conclusion, however, without even considering whether state law provided any analogy at all to the WARN Act. This approach inevitably leads to state law borrowing in every instance, because no two federal causes of action are identical. In light of the lower courts' inability to properly apply this Court's statute of limitations borrowing decisions, further guidance is necessary.

Finally, this Court should grant review because the Third Circuit's decision is simply wrong. The Third Circuit failed to recognize that the NLRA, unlike any state law, provides a close analogy to the WARN Act and that state-law borrowing would encourage forum shopping and time-consuming and expensive collateral litigation.

I. THE CONFLICT BETWEEN THE DECISIONS OF THE SECOND AND THIRD CIRCUITS AND THE DECISIONS OF THE FIFTH AND SIXTH CIRCUITS SHOULD BE RESOLVED BY THIS COURT AS SOON AS POSSIBLE

To date, four Circuits have considered which limitations period governs WARN Act claims. In the present case, the Third Circuit held that a limitations period should be borrowed from state law, but it refused to identify which of at least four possible state limitations periods governed (App., *infra,* 15a-16a).

The Second Circuit also held that WARN Act claims were governed by state limitations periods. *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.,* 999 F.2d 51, 57 (2d Cir. 1993). The Second Circuit acknowledged that no state law was "perfectly analogous to WARN," but it decided that Vermont's six-year contract limitations period applied to WARN Act claims. *Id.* The court reasoned that WARN Act claims were analo-

gous to workers' compensation claims, which were governed by the Vermont contract limitations period. Because this analogy was not wholly convincing, the court also suggested that WARN Act claims were akin to claims of promissory estoppel. *Id.*

In contrast, the Sixth Circuit has held that WARN Act claims are governed by the six-month limitations period of Section 10(b) of the NLRA. *United Mine Workers of America v. Peabody Coal Co.*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994). The Sixth Circuit reasoned that a uniform limitations period for WARN Act claims was desirable, because there was no obvious state-law analogy to the WARN Act and because the Act's broad venue provision would otherwise encourage forum shopping. *Id.* at *6-7. The Sixth Circuit then ruled that the NLRA provided a closer analogy to the WARN Act than any state statute: "[D]espite admitted differences between WARN and the NLRA, both are designed to afford protection against job loss—a safeguard that goes to the heart of the employment relationship." *Id.* at *7. Finally, the Sixth Circuit held that a six-month limitations period was consistent with the WARN Act's "aim of starting employees on the road to retraining and reemployment before unemployment becomes a problem." *Id.*

Likewise, the Fifth Circuit held that WARN Act claims were governed by the six-month limitations period of Section 10(b) of the NLRA. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, 228 (5th Cir. 1994), *reh'g en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994). The Fifth Circuit observed that "WARN and the NLRA share similar structures" and language, 31 F.3d at 231, and that both statutes require employers to notify unions of impending plant closures, *id.* at 232. The Fifth Circuit noted that this Court has borrowed limitations periods from federal statutes with "similarities in purpose and structure," and it criticized the Second and Third Circuits for requiring a "strict identity of purposes" between the

NLRA and the WARN Act. *Id.* at 233 (citing *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 148, 156 (1987)).

The Fifth Circuit then determined that no state limitations period was as analogous to the WARN Act as the NLRA:

> None [of the state limitations periods] seeks to accommodate the same, or very similar, interests as WARN, much less govern an action that will frequently overlap with WARN. And, needless to say, none embraces causes of action that share common language with WARN.

Id. at 236 (footnotes omitted).

The Fifth Circuit also noted that, because courts generally borrow a limitations period from the forum state, the WARN Act's expansive venue provision would lead to forum shopping. *Id.* at 237. In addition, the Court observed that WARN Act class actions could involve claims from facilities in multiple states,[2] and the Court concluded that "valuable time and resources should not be consumed litigating" which state's limitations periods applied. *Id.* at 237-38. Finally, the Fifth Circuit ruled that the NLRA's six-month limitations period was appropriate, because "federal labor policy has long favored the rapid settlement of disputes between an employer and an employee," and because a lengthy limitations period "could create untold problems concerning the availability of evidence." *Id.* at 238.

The question presented by this petition has been fully briefed in four Circuits with extensive participation by *amici curiae*.[3] Thus, the circuit split has developed not

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[2] In fact, one of the cases before the Fifth Circuit was a multi-state WARN Act class action. 31 F.3d at 237.

[3] The Chamber of Commerce of the United States of America participated as *amicus curiae* in the Third and Sixth Circuits. The following labor organizations participated as *amici curiae* in

because of any lack of ventilation of the pertinent issues, but rather because, as the dissenting member of *Halkias* panel acknowledged, "[t]his is a difficult case" and "[r]easonable minds can disagree about the proper outcome." *Halkias*, 31 F.3d at 241 (Wisdom, J., dissenting).[4] Accordingly, there is no reason to believe that further lower court review will shed additional light on the proper result in this case, and, therefore, this Court should now provide definitive guidance.

Moreover, in light of this Court's recent retroactivity decisions, it is particularly important that the circuit split not be allowed to fester. When this Court ultimately re-

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the Third, Fifth and/or Sixth Circuits: the Oil, Chemical and Atomic Workers International Union; the United Mine Workers of America; the NLG/Sugar Law Center for Economic & Social Justice; the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America; Automobile Mechanics' Local 701; the International Association of Machinists; and the United Steelworkers of America.

[4] The split in the circuits reflects the strong division of opinion in the district courts regarding the appropriate limitations period for WARN Act claims. *Compare United Mine Workers of America v. Peabody Coal Co.*, No. 92-CV-73 (W.D. Ky. 1993) (applying limitations period from § 10(b) of the NLRA to WARN Act claims), *aff'd*, 1994 WL 590188 (6th Cir. Oct. 31, 1994) *and Halkias v. General Dynamics Corp.*, 825 F. Supp. 123 (N.D. Tex. 1993) (same), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *reh'g en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994) *and Thomas v. North Star Steel Co.*, No. 4:CV-92-1507 (M.D. Pa. May 25, 1993) (same), *rev'd*, 32 F.2d 53 (3d Cir. 1994) *and Staudt v. Glastron, Inc.*, 8 Indiv. Empl. Rights Cas. (BNA) 462 (W.D. Tex. Feb. 23, 1993) (same), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *rehg' en banc granted*, 1994 WL 520351 (5th Cir. Sept. 22, 1994) *and Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992) (same), *judgment entered*, 829 F. Supp. 561 (E.D.N.Y. 1993) *with Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432 (N.D. Ill. 1993) (applying state limitations period to WARN Act claims) *and Frymire v. Ampex Corp.*, 821 F. Supp. 651 (D. Colo. 1993) (same) *and Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993) (same).

solves the split, its decision will likely apply retroactively. *See, e.g., Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 366 (1991) [hereinafter *Lampf*]; *id.* at 370 (O'Connor, J., dissenting) (criticizing Court for applying federal limitations period to Rule 10b-5 claims retroactively). Hence, without immediate guidance from this Court, parties will be forced to expend tremendous resources litigating claims that may ultimately be deemed time-barred. More importantly, without immediate review by this Court, litigants may be stampeded into unnecessary early filing of WARN Act claims or may be lulled into filing claims after the six-month limitations period has expired.

In addition, until this Court decides which limitations period governs WARN Act claims, potentially time-barred plaintiffs will likely file claims in the courts of the Second and Third Circuits, where they can be assured (at least for the moment) that their claims will be governed by lengthy limitations periods. This forum shopping will burden the courts in these Circuits and will require employers, employees and unions to litigate claims in otherwise inconvenient forums. For all these reasons, it makes good sense for this Court to decide which limitations period governs WARN Act claims as soon as possible.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE ANALYTICAL FRAMEWORK ESTABLISHED BY THIS COURT FOR DECIDING A LIMITATIONS BORROWING QUESTION

In its recent statute of limitations decisions, this Court has required that both state and federal statutes be scrutinized to determine which provided the "closer analogy" to the statute at issue. For example, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 148 (1987), this Court applied a Clayton Act limitations period to civil RICO claims because there was no "satisfactory state law analogue to RICO"; in contrast, RICO and the Clayton Act shared "similarities in purpose and structure." *Id.* at 152.

Similarly, in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court ruled that the NLRA provided an analogy to "hybrid" claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "more apt than any of the suggested state-law parallels." *Id.* at 169. And in *Reed v. United Transp. Union*, 488 U.S. 319 (1989), this Court borrowed state limitations periods for claims under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2), because the claims were "readily analogized . . . to state personal injury actions," *id.* at 326, and federal law "d[id] not provide a more analogous statute," *id.* at 344.[5]

Lower courts, however, have failed to understand that both state and federal limitations periods must be considered before identifying the "closer analogy." For example, in the decision below, the Court of Appeals refused to borrow a limitations period from the NLRA on the ground that it did not provide a close enough analogy, even though the Court never bothered to decide whether any state law offered any analogy to the WARN Act. Similarly, in *United Paperworkers*, the Second Circuit rejected the analogy between the NLRA and the WARN Act before weighing state law alternatives. 999 F.2d at 56. Under this mode of analysis, courts will always borrow state limitations periods, because no two federal statutes are perfectly analogous, *i.e.*, there will always be some substantial differences between different federal statutes. Such a result is directly in conflict with this

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[5] In *Lampf*, a plurality of this Court ultimately ruled that a limitations period for a cause of action implied under a statute should be borrowed from elsewhere in the statute. 501 U.S. at 359. Therefore, though this Court implicitly recognized the need ordinarily to compare both state and federal analogies, it ruled in the particular circumstances of *Lampf* that "consideration of state-law alternatives [was] unnecessary." *Id.* at 362.

Court's decisions in *DelCostello* and *Agency Holding*. In light of the lower courts' failure to determine whether a different federal statute provides a "closer," rather than a perfect, analogy to a federal cause of action, this Court should grant review to make clear beyond any doubt the need to follow the mandated process for borrowing state limitations periods.

III. THE DECISION BELOW IS WRONG

Because the Court of Appeals disregarded this Court's statute of limitations rulings, it became unduly fixated on the differences between the NLRA and the WARN Act, despite their "family resemblance," and it failed to adequately weigh the litigation practicalities that favor a uniform federal limitations period.

First, the Court of Appeals incorrectly ruled that because "all WARN claims involve nearly identical fact patterns," a uniform limitations period was unnecessary (App., *infra*, 13a). The Court failed to recognize that although WARN Act claims may resemble each other, they have no analogy in state law. Thus, without a uniform limitations period, courts will be forced to choose from a host of potential limitations periods—none of which offers the slightest analogy to the WARN Act.[6] A uniform limitations period should govern the WARN Act "to avoid [this] intolerable 'uncertainty and time-consuming

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[6] In the case below, four Pennsylvania limitations periods had been suggested: the two-year period for enforcing civil penalties, the three-year period for bringing claims under the Pennsylvania Wage Payment and Collection Law, the four-year period for breach of an implied contract, and the six-year residual period (App., *infra*, 15a & n.5). Similarly, in *Halkias*, three Texas limitations periods were suggested: the two-year period for tort claims, the four-year period for contract claims, and the four-year residual statute. 31 F.3d at 234.

litigation.'" *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)).

Second, the Court of Appeals failed to see that the geographic character of the WARN Act (in particular, its broad venue provision) weighs heavily in favor of borrowing a limitations period from federal law. Under the WARN Act, unions can file claims anywhere an employer transacts business. 29 U.S.C. § 2104(a)(5). Indeed, in this case the Union opted to sue Crown in Pennsylvania for an alleged WARN Act violation at a Georgia plant, and the Union urged the adoption of a Pennsylvania limitations period. In addition, as the Fifth Circuit observed in *Halkias*, WARN Act class actions may involve claims from facilities in multiple states. 31 F.3d at 237. Hence, borrowing various state limitations periods for WARN Act claims would " 'present the danger of forum shopping and, at the very least, . . . would virtually guarante[e] . . . complex and expensive litigation . . . over what should be a straightforward matter.' " *Lampf*, 501 U.S. at 357 (quoting *Agency Holding Corp*, 483 U.S. at 154) (internal quotations omitted).

Finally, the Court of Appeals failed to consider the fact that the NLRA provides a "closer analogy" to the WARN Act than any state limitations period. The NLRA, like the WARN Act, requires employers to provide unions with advance notice of plant closings and similar managerial actions that result in the layoff of employees. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981) (employer must notify union to ensure meaningful opportunity to bargain over effects of closing). Although the NLRA does not specify a fixed amount of notice, the notice must be sufficiently in advance of the closing to allow meaningful negotiations before the actual closing. *Id.* at 682; *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir.) ("A concomitant element of 'meaningful' bargaining is timely notice to the union of the decision to close, so that good

faith bargaining does not become futile or impossible."), *cert. denied*, 464 U.S. 892 (1983).[7]

Thus, the NLRA imposes substantive obligations regarding plant closings that are remarkably similar to those contained in the WARN Act. The purposes of both the NLRA and the WARN Act in this area are the same —to ameliorate the effects that plant closings have on employees and to strike a balance between the interests of employers in running their businesses and the interests of employees who often suffer the consequences of such managerial decisions. *Compare Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306-07 (8th Cir. 1988) (noting that NLRA requires advance notice of plant closings in part to protect employees from the "ravages of economic dislocation") *with* 20 C.F.R. § 639.1(a) (stating that WARN Act provides employees with "transition time to adjust to the prospective loss of employment"). Hence, the NLRA provides a "closer fit" with the WARN Act than any state law. *See Lampf*, 501 U.S. at 357.

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[7] Other similarities exist between substantive requirements imposed by both statutes. For example, under both the NLRA and the WARN Act, the amount of notice required may be reduced when the employer can demonstrate special circumstances. The WARN Act contains provisions which allow for a reduction of notice in exceptional circumstances. 29 U.S.C. § 2102(b). Caselaw under the NLRA is to the same effect. *See, e.g., Los Angeles Soap Co.*, 300 N.L.R.B. 289, 295 (1990) (notice excused when employer faces bona fide emergency); *Chippewa Motor Freight, Inc.*, 261 N.L.R.B. 455, 459-60 (1982) (two days' notice sufficient under NLRA when employer decided to close because of financial difficulties and promptly notified union of its decision).

The NLRA and the WARN Act also provide similar remedies for violations of their respective notice requirements. A violation of the WARN Act requires payment of back pay for each day of the violation. 29 U.S.C. § 2104(a)(1)(A). Similarly, the NLRB has established back pay as the remedy for an employer's failure to provide notice or otherwise to satisfy its effects bargaining obligations. *See, e.g., National Car Rental System, Inc.*, 252 N.L.R.B. 159, 164 (1980), *modified and enforced*, 672 F.2d 1182 (3d Cir. 1982).

CONCLUSION

If the current circuit split is allowed to fester, uncertainty would adversely affect all litigants:

> "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."

Agency Holding Corp., 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.34). Moreover, the federal judicial system will be forced to bear the burden of significant forum shopping until the issue is finally decided. This Court should grant the petition to resolve the circuit split regarding the WARN Act's limitations period, to overturn the error of the decision below, and to provide the lower courts with continued guidance regarding the process of implying limitations periods for federal statutes without such provisions.

Respectfully submitted,

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November 8, 1994

APPENDIX A

Filed August 10, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-2008 and 93-7613

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

v.

CROWN CORK & SEAL CO., INC.,
Appellant
(In No. 93-2008)

CHARLES A. THOMAS; DARREN BOOP; ROBERT W. BOWER; WILLIAM D. BRIDGE; JAMES CLINGAN; NEAL B. HOUSNER; JONATHAN L. NOAKER; WAYNE D. ORNER; GERALD W. RANCK; HAROLD E. VAN SICKLE, JR.; RICHARD A. WINTER; EUGENE L. WITMER, SR.,
Appellants
(In No. 93-7613)

v.

NORTH STAR STEEL COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 92-CV-05968)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 92-CV-01507)

Argued May 24, 1994

Before: Cowen and Roth, *Circuit Judges*
Ackerman, *District Judge* *

(Filed August 10, 1994)

OPINION OF THE COURT

ACKERMAN, *District Judge.*

These two cases present the following discrete issue: In an action brought pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. ("WARN"), a statute which, like so many others, fails to explicitly provide a statute of limitations, should we follow the general rule and borrow a state statute of limitations or should we instead opt for the six-month statute of limitations set forth in section 10(b) of the federal National Labor Relations Act. The two cases present the identical issue for review and we will consider both cases in this Opinion.

For the reasons detailed below, we find that for cases arising under WARN, courts should apply the most closely analogous state statute of limitations. Thus, we will reverse the decision in *Thomas v. North Star Steel*

*** Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.**

and will affirm the decision in *United Steelworkers of America v. Crown Cork & Seal.*

Background

Both of the underlying cases were filed pursuant to WARN, a federal statute which requires companies with one hundred or more employees to provide their workers with a minimum of sixty days written notice before a plant closing or mass layoff.[1] Employers who fail to provide the requisite notice must compensate employees suffering an employment loss for each day of the violation. The statute creates a private civil action for damages in federal court.

On September 9, 1991, the United Steelworkers of America, AFL-CIO-CLC, filed a complaint in federal court alleging that the North Star Steel Company ("North Star") had violated the WARN Act by failing to give the union sixty days advance notice of a February 25, 1991 layoff of about 270 people, at the company's Milton, Pennsylvania plant. Although the suit was filed more than six months after the layoff occurred, North Star did not raise the statute of limitations as a defense. On April 9, 1992, the district court granted the union's motion for summary judgment on liability, holding that the layoff constituted a "plant closing" subject to WARN. In a separate Order, dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steel-*

[1] The statute defines "plant closing" as the permanent or temporary shutdown of a single site of employment, which results in an employment loss to a certain minimum number of employees. 29 U.S.C. § 2101(a)(2). "Mass layoff" is defined as a reduction-in-force, resulting from a plant closing, which results in a certain minimum employment loss. 29 U.S.C. § 2101(a)(3). A layoff must last more than six months before it qualifies as actionable under WARN, 29 U.S.C. § 2101(a)(6)(B).

workers v. North Star Steel, 809 F. Supp. 5, 6-7 (M.D.Pa. 1992), *aff'd* 5 F.3d 39 (1993).

Appellants were non-unionized employees of North Star, unrepresented by the union and hence unaffected by the union's successful lawsuit against North Star. They therefore filed a separate action, the instant case, also seeking damages pursuant to WARN. On May 25, 1993, the district court granted North Star's motion for summary judgment, finding that the action was barred under what it deemed to be the applicable statute of limitations. The employees' motion for reconsideration was denied on August 26, 1993. This appeal followed.

United Steelworkers of America v. Crown Cork & Seal Co., Inc. ("Crown Cork"), arises out of an event that took place on September 30, 1991. On that day, the company ordered a reduction-in-force and shutdown of its Perry, Georgia plant. As a result of this reduction in force, about 85 employees were terminated. On October 15, 1992, the United Steelworkers of America (the union) filed a complaint, alleging that the company violated WARN by failing to give it 60 days notice prior to the shutdown. Crown Cork & Seal then moved for summary judgment, contending that the action was barred by the applicable statute of limitations. The district court denied the motion on August 24, 1993 but in an order dated September 26, 1993, certified the August order for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292.

We have jurisdiction over the appeal in *Thomas v. North Star Steel* pursuant to 28 U.S.C. § 1291. Our jurisdiction over *United Steelworkers of America v. Crown Cork & Seal* arises from our October 13, 1993 Order granting the company permission to appeal pursuant to 28 U.S.C. § 1292(b). Our review over both cases is plenary.

Discussion

In this case we visit a general question of federal law that we have repeatedly addressed: When a federal statute does not contain an explicit statute of limitations, when is it appropriate to borrow a statute of limitations from elsewhere in federal law rather than adopting the most closely analogous state statute of limitations.

The companies argue that in this case, a federal statute —the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act ("NLRA") for filing a claim of an unfair labor practice with the National Labor Relations Board ("NLRB")—provides the most appropriate limitations period. The employees and the union exhort us to borrow one of various state statutes. Courts addressing the question have adopted both approaches. Some have borrowed the six-month § 10(b) statute; *see, e.g., Newspaper and Mail Delivers' Union of N.Y. and Vicinity v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992) (adopting NLRA statute); *Staudt v. Glastron, Inc.*, No. SA-92-CA-1174, 1993 WL 85356, 1993 U.S. Dist. LEXIS 3090 (W.D.Tex. February 23, 1993) (same). Other courts, including the only Court of Appeals to reach the question, have expressly considered and rejected the section 10(b) six-month period, instead opting for various state law limitations periods. *See, e.g. United Paperworkers Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1992) (hereinafter *United Paperworkers*); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993) (rejecting NLRA statute and adopting six-year state contract statute); *Automobile Mechanics' Local No. 701 of the Int'l Assoc. of Machinists & Aerospace Workers v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432 (N.D. Ill. 1993) (rejecting NLRA statute and adopting, without specifying, most analogous state statute).

The two district court opinions before us now reached contrary conclusions. The district court in *North Star*

Steel adopted the six-month statute of limitations set forth in § 10(b); the court in *Crown Cork & Seal* rejected the § 10(b) statute, and without deciding the appropriate statute of limitations, found the action timely under all of the possibilities.

Our analysis must begin with the general assumption that when a federal statute is silent as to a statute of limitations, the court should apply "the most closely analogous statute of limitations under state law." *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 158 (1983); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, ——, 111 S.Ct. 2773, 2778 (1991); *Haggerty v. USAIR, Inc.,* 952 F.2d 781, 783 (3d Cir. 1992). This general rule is not set in stone, however. Rather, the United States Supreme Court has recognized that, in order to prevent frustration of federal policy, it is sometimes more appropriate to borrow a limitations period from an analogous area of federal law. *DelCostello,* 462 U.S. at 162. This exception is "closely circumscribed", *see Reed v. United Transp. Union,* 488 U.S. 319, 324 (1989), and should only be applied "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking". *DelCostello,* 462 U.S. at 172.

In following the principles enunciated in *DelCostello* and *Reed,* we repeatedly have recognized our duty "to take seriously [the Supreme Court's admonition] that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies." *Reed,* 488 U.S. at 327. For instance, the mere fact that a statute touches upon issues of labor law does not mean that the Court must resort to the statute of limitations contained in § 10(b) of the NLRA. Thus, in *Eichleay Corp. v. Intern. Ass'n of Bridge, Structural and Orna-*

mental Iron Workers, 944 F.2d 1047 (3d Cir. 1991), we applied a state statute of limitations for vacating arbitration awards to an action to enforce an arbitration awards pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Similarly, in *Brenner v. Local 514, United Brothers of Carpenters,* 927 F.2d 1283 (3d Cir. 1991), we remanded the case to the district court to apply the most closely analogous state statute of limitations to a § 301 claim of retaliation against internal union activities. In *Grasty v. Amalgamated Clothing & Textile Workers Union,* 828 F.2d 123 (3d Cir. 1987), *cert. denied,* 484 U.S. 1042 (1988), we applied Pennsylvania's four-year breach of contract statute of limitations to a union member's claim that the union failed to rebate dues and improperly charged disabled workers. In this case, as in those, the federal statute may be borrowed only if it clearly provides a closer analogy than the available state statutes. Answering this question requires us to focus on the respective policies behind the NLRA and WARN.

The primary purpose of the NLRA is "to protect the right of workers to join together in labor organizations and collectively bargain for the terms and conditions of employment." *United Paperworkers,* 999 F.2d at 54; *see also Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 20-21 (1987). The statute "is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Fort Halifax,* 482 U.S. at 20 (*citing Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985)). More specifically, as the Supreme Court noted in *Reed,* the NLRA has "effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures". *Reed,* 488 U.S. at 329. The NLRA, then, is concerned with the importance and integrity of a process. From the NLRA's perspective,

"minimum terms of employment" that may arise from another federal statute—or from the process of collective bargaining itself—are irrelevant so long as the process is fair.

The six-month statute of limitations set forth in § 10(b) represents Congress's view of the proper balancing of the various interests involved in the process of collective bargaining. The six-month period takes into account "the national interests in stable bargaining relationships and finality of private setlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *DelCostello*, 462 U.S. at 171 (*quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. at 70-71 (1980) (opinion concurring in the judgment)). In *DelCostello* itself, it was precisely this direct effect on the collective bargaining process that led the Court to invoke the § 10(b) statute of limitations. That case involved a § 301 hybrid suit (1) against an employer for breach of a collective bargaining agreement pursuant to the NLRA, and (2) against a labor union for breach of the duty of fair representation. Such a hybrid action really alleges that the process of collective bargaining has broken down. Thus, the NLRA policies applied: "The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote —the formation of the . . . agreement and the private settlement of disputes under it.'" *DelCostello*, 462 U.S. at 171 (*quoting Mitchell*, 451 U.S. at 70-71 (opinion concurring in judgment)).

In *DelCostello*, the parallels between the cause of action and the policies behind the NLRA were unmistakable. In *Reed*, however, the Supreme Court, while acknowledging that many employment-related statutes affecting labor will in some way affect the collective bargaining process,

cautioned that even plausible "tangential and remote" effects upon collective bargaining are insufficient to warrant departure from the general rule. *Reed*, 488 U.S. at 330, 331. Thus, the Court refused to borrow the § 10(b) NLRA statute of limitations to govern a union member's free speech claim against the union.

WARN falls into this latter category—any effects it has on collective bargaining are tangential at best. The benefits of WARN accrue not only to unionized workers but to all workers alike. WARN, like dozens of other employment statutes which bestow substantive rights simply "gives employees something for which they otherwise might have to bargain." *Fort Halifax*, 482 U.S. at 21 (addressing Maine plant closing law). That is why in that case, the Supreme Court held that the NLRA did not preempt a Maine statute providing protection to workers from plant closings. Unlike the NLRA, the Maine regulation "provide[d] protection to individual union and non-union workers alike, and thus 'neither encourage[d] nor discourage[d] the collective bargaining processes . . . .'" *Fort Halifax*, 482 U.S. at 21 (*quoting Metropolitan Life*, 471 U.S. at 755). The WARN protections, like the Maine plant closing law discussed in *Fort Halifax*, is also properly understood as establishing part of the "backdrop" of rights that the parties bring to the collective bargaining table, and not as affecting the substantive rights that may emerge from the collective bargaining discussions. *Fort Halifax*, 482 U.S. at 21.

WARN serves a broader purpose as well, that goes beyond the employer-employee relationship addressed by the NLRA. The statute mandates that employers planning a plant closing or mass lay-off must notify the "chief elected official of the unit of local government within which such closing or layoff is to occur". 29 U.S.C. § 2102(a)(2). Employers who fail to comply with the provision are subject to civil penalties of $500 per day. 29 U.S.C. § 2104(a)(3). Thus, WARN serves very broad societal goals—to protect workers, their fami-

lies and their communities in the wake of potentially harmful employment decisions. Its remedial nature really has very little to do with the day to day process of collective bargaining.

To be sure, it cannot be said that WARN has *no* effect on collective bargaining. The companies point out, for example, that under the NLRA, an employer must provide notice to represented workers, in order to give the workers the opportunity for meaningful bargaining. *See, e.g. First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). This fact does present a superficial resemblance between the NLRA and WARN, but on closer inspection, it highlights the difference. The rights bestowed by the NLRA focus solely on the need for a meaningful collective bargaining process; WARN provides an across-the-board substantive right. The implementing regulations of the statute highlight this crucial distinction by providing that "[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but *may not reduce WARN rights.*" 20 C.F.R. § 639.1(g) (emphasis added). In other words, the NLRA requires notice to protect the meaningfulness of the collective-bargaining process; WARN's purpose is to substantively protect employees and their communities.

The fact that courts have looked to NLRA cases in interpreting WARN, and the fact that there are some definitional overlaps, does not change this fundamental distinction between the two statutes. At best, WARN has a family resemblance to the NLRA. In *Brenner v. Local 514, United Brothers of Carpenters*, 927 F.2d 1283 (3d Cir. 1991), we rejected the proposition that a family resemblance is sufficient to justify adopting the § 10(b) statute of limitations. There, we held that a claim against a union for breach of the duty of fair representation, while having some effect upon the collective bargaining atmosphere, did not have an effect sufficient

enough to counsel adoption of the federal statute. *Id.* at 1295. In order to justify departing from the general rule, the analogy must be more direct.[2]

As the Second Circuit pointed out in *United Paperworkers*, courts adopting the section 10(b) statute of limitations for WARN actions "have failed to grasp this crucial distinction between statutes which specifically regulate the collective bargaining relationship and those which remain peripheral to that concern." *United Paperworkers*, 999 F.2d at 55.

Nonetheless, despite the vast gulf between the respective policies behind the NLRA and WARN, the companies look for relief in our own prior decision of *Haggerty v. USAir*. Their reliance is misplaced. That case addressed the Employee Protection Program of the Airline Deregulation Act, 49 U.S.C. § 1552(d)(1) (1988) ("EPP"), a federal statute which provided certain air carrier employees with a right of first hire against other air carriers. The EPP directly affected the collective bargaining environment by impacting on "the seniority relationships of other employees . . . ." *Haggerty*, 952 F.2d at 787. As in *DelCostello*, this direct impact on the collective bargaining environment required a statute of limitations that furthered the need for the rapid resolution of labor disputes. And since, as we noted in *Haggerty* itself, the air-

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[2] The lack of similarity between the NLRA and WARN becomes even starker when one looks at the remedies afforded by the respective statutes. Under the NLRA, the National Labor Relations Board has broad discretion to " 'take such affirmative action including reinstatement of employees . . . as will effectuate the policies of [the Act]' to remedy an employer's unfair labor practices." *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 453 (3d Cir. 1992). WARN by its very terms precludes such broad equitable relief: "[A] Federal court shall *not* have authority to enjoin a plant closing or mass layoff." (emphasis added). Similarly, the NLRB's discretion in awarding back pay is broad. *See Tubari*, 959 F.2d at 453. WARN, though, provides a strict statutory mechanism for computing damages.

line industry was nearly 90% unionized and the right-to-hire program was inserted into the statute at the insistence of unions, the six-month section 10(b) statute of limitations was the obvious choice.[3]

In determining whether to apply a federal statute of limitations, we also have considered whether the federal policies at stake and the practicalities of litigation make the NLRA statute "a significantly more appropriate vehicle for interstitial lawmaking". *DelCostello*, 462 U.S. at 172; *Haggerty*, 952 F.2d at 786. The companies argue that WARN requires a single federal statute of limitations, because subjecting the companies to multiple state statutes of limitations would make it difficult for employers to calculate their contingent liabilities.

This case simply does not present serious uniformity concerns. The need for uniformity becomes real only when the federal statute at issue contains numerous types of claims and legal theories or when the prospect of multiple state statutes of limitation presents serious practical problems. Uniformity concerns motivated the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), to apply a uniform limitations period (a state limitations period in that case) to claims arising under 42 U.S.C. § 1983. As the Court pointed out, claims under the broad civil rights statute "would encompass numerous and diverse topics and subtopics." *Wilson*, 471 U.S. at 273. Thus, "[i]f the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim." *Id.* at 273-74. The Court used similar reasoning in *Agency Holding*

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[3] We also found that "as with the NLRA, the Department of Labor has had a role in administering the EPP as the agency charged with maintaining a listing of airline vacancies for the use of protected employees under the EPP." *Haggerty*, 952 F.2d at 787.

Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987): Since RICO "encompass[es] numerous diverse topics and subtopics . . . a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.'" *Id.* at 149-50 (*quoting Wilson*, 471 U.S. at 273, 272).

In *Haggerty*, we relied on uniformity concerns in deciding to apply the section 10(b) statute. Under the EPP, a protected employee who had been terminated or furloughed could claim a right of first hire with *any other carrier* that was hiring employees. We noted that airline carriers would have difficulty "managing a cohesive policy with respect to the EPP were they subject to the varying limitations periods of each of the states in which they operate." *Haggerty*, 952 F.2d at 786. Thus, without a uniform federal statute of limitations, the entire airline industry faced constant and protracted uncertainty.

Unlike RICO and Section 1983, WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries. And unlike the EPP, under which an airline may be the fortuitous victim of events involving other air carriers all across the country, WARN's obligations simply do not implicate such geographic concerns favoring uniformity. As the Second Circuit put it:

> "The term 'plant closing' as defined by the Act is limited to single sites of employment, and venue is limited to the district where the violation is alleged to have occurred or where the employer does business; unless a single plant site straddles the boundary between two states, it is unlikely prospective plaintiffs will have a broad choice of fora in which to bring their claims or that doubt will arise as to in which state triggering events occurred. Therefore, geographic considerations do not counsel for the application of a uniform federal limitations period for

> WARN Act claims." *United Paperworkers*, 999 F.2d at 56 (quoting district court opinion).

Because of these same factors, "courts will have little difficulty in determining which state's law to apply and workers will gain few advantages by suing in a court far from the site of injury." *United Paperworkers*, 999 F.2d at 56.[4]

The companies' further concern about the effect of a plant closing on service of process, and on the mechanics of litigation, simply do not implicate federal concerns; rather, they are the same concerns at issue in every cause of action, whenever the statute of limitations is longer then a year or so.

On the other hand, a short statute of limitations could very well frustrate the policies behind WARN. As the Second Circuit found, under the complex administrative scheme of the NLRA, in which the NLRB plays a large and active role in prosecuting claims, "[t]he burden on complainants in pursuing a claim is minimal, justifying the short statute of limitations." *United Paperworkers*, 999 F.2d at 55. WARN does not contain those administrative safeguards, and a six-month statute could very well constitute too great a burden on the claimants.

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[4] Since the *Crown Cork & Seal* action occurred in Perry, Georgia, there is a question as to whether the statute of limitations should be borrowed from Georgia or Pennsylvania law. We have previously held that "as a general rule the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants." *Consolidated Express, Inc. v. New York Shipping Associaiton, Inc.*, 602 F.2d 494, 507-08 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980). We need not decide whether the statute of limitations should be borrowed from Pennsylvania or Georgia law, since no party has brought to the lower courts' attention a statute of limitations, from either state, under which the instant acions would be untimely.

Finally, cases finding that the practicalities of litigation favor adoption of a federal statute of limitations have focused on the problems with the potential state statutes. For example, in *DelCostello*, the Court pointed out that the two possible state statutes were inconsistent with the relevant federal policy favoring the finality of settlements and the opportunity to attack an unfair result under collective bargaining. The extremely short time periods in state arbitration statutes "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.* at 166. Conversely, the relatively lengthy time period governing legal malpractice claims "would preclude the relatively rapid final resolution of labor disputes favored by federal law—a problem not present when a party to a commercial arbitration sues his lawyer." *Id.* at 168.

Here, the state statutes of limitations brought to the lower courts' attention—which range from the two-year period for enforcing civil penalties under 42 Pa. Cons. Stat. Ann. § 5524(5) to Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527—do not interfere with federal policy.[5] Because of WARN's remedial nature and its limited effect on collective bargaining, a short statute of limitations is unnecessary. And none of the state statutes are so short as to interfere with a worker's potential for seeking or gaining relief. While we acknowledge that none of the possible state laws provide perfect analogies to WARN, the absence of a perfect analogy is an insufficient reason to depart from the general rule, particularly when federal law does not provide a satisfactory alternative. *See, e.g., DelCostello*, 462 U.S. at 171; *Gavalik v. Continental Can Co.*, 812 F.2d 834, 847 (3d Cir. 1987).

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[5] Other possible state statutes of limitations include the three year period set forth in 43 Pa. Stat. Ann. § 260.9a(g) for bringing claims under the Pennsylvania Wage Payment and Collection Law, and the four year limitations periods for breach of an implied contract, 42 Pa. Cons. Stat. Ann. § 5525(4).

Here, we need not decide which state statute applies, since the actions would be timely under any of the possible statutes of limitations brought to the court's attention.

Conclusion

We conclude that, for the reasons detailed above, for actions arising under WARN, courts must apply the most closely analogous state statute of limitations. We therefore will affirm the district court's Order in *United Steelworkers of America v. Crown Cork & Seal* denying Crown Cork & Seal's motion for summary judgment. We will reverse the Order of the district court in *Thomas v. North Star Steel* granting North Star's motion for summany judgment in favor of North Star. These cases will be remanded to the respective district courts for further proceedings consistent with this opinion. Costs taxed against the appellant in 93-2008. Costs taxed against the appellee in 93-7613.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

[Filed Aug. 25, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 92-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC

v.

CROWN CORK & SEAL CO., INC.

Memorandum

O'Neill, J. August 24, 1993

On October 15, 1992, plaintiff United Steelworkers of America, AFL-CIO/CLC ("USW"), filed a complaint seeking declaratory and monetary relief from defendant Crown, Cork & Seal Co., Inc. ("CC & S"). Plaintiff "is the exclusive collective bargaining representative unit composed of certain" workers employed by defendant's company. *See* Complaint at ¶.3. Defendant is a national corporation with headquarters located in Philadelphia. It employed more than 100 employees at its plant in Perry, Georgia. *Id.* at ¶.4.

In its complaint, plaintiff alleges that defendant's termination of about approximately 85 employees at its Perry plant on or about September 30, 1991, violated the provisions of the Worker Adjustment and Retraining Act (the "WARN Act"), 29 U.S.C. § 2101 *et seq.* Es-

sentially, plaintiff contends that defendant violated section 3(a) of the WARN Act by failing to notify the USW of its mass layoff plans at least 60 days before the layoff. *See* Complaint at ¶.12.

Currently before the Court is defendant's motion for summary judgment. Defendant contends that plaintiff's cause of action is barred by the applicable statute of limitations. As demonstrated by counsels' presentations at oral argument on May 20, 1993, and subsequent correspondence regarding recent decisions on the WARN Act's statute of limitations, the question before the Court is topical. Because I agree with the reasoning of the Court of Appeals for the Second Circuit in *United Paperworkers v. Specialty Paperboard, Inc.*, 1993 U.S. App. LEXIS 18608 (2d Cir. July 19, 1993), I reject defendant's arguments and therefore deny its motion for summary judgment.

WARN requires companies with one hundred or more employees to provide workers with at least sixty-days' written notice before a mass layoff or plant closing.[1] A company that fails to provide such notice prior to a mass layoff or plant closing may be sued in federal court by employees who suffer an employment loss for backpay and benefits for each day of violation. *See United Paperworkers*, 1993 U.S. App. LEXIS 18608 at *3-*4 (canvassing WARN statute).

WARN does not include an express statute of limitations. Defendant asserts that the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is the appropriate limitations period. Plaintiff argues that this Court should apply a state limitations period.

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[1] "While a termination immediately qualifies as an employment loss, 29 U.S.C. § 2101(a)(6)(A), a layoff must last more than six months to qualify. 29 U.S.C. § 2101(a)(6)(B)." *United Paperworkers v. Specialty Paperboard, Inc.*, 1993 U.S. App. LEXIS 18608 at *3.

Both parties agree that the starting point for this court's inquiry is *DelCostello v. Teamsters*, 462 U.S. 151 (1983). In *DelCostello*, the Court held that the six-month period in section 10(b) of the NLRA applies when an employee sues both an employer for breach of a collective bargaining agreement and a union for breach of its duty of fair representation for mishandling the ensuing grievance or arbitration proceedings.

The Court set out the law governing the determination of a limitations period for a federal civil statute in the absence of an express period. Writing for the Court, Justice Brennan stated that "[i]n such situations . . . [w]e have generally concluded that Congress intended that the Courts apply the most closely analogous statute of limitations under state law." *Id.* at 158.

However, as the Court noted, sometimes "state statutes of limitations can be unsatisfactory vehicles for enforcement of federal law." *Id.* at 161. In these situations, the Court borrows limitations periods from related federal statutes or employs an alternative such as laches. *Id.* at 162. It then reasoned that the six-month period in section 10(b) of the NLRA provided a better analogy than any state statute in formulating a limitations period for an employee's "hybrid § 301/fair representation claim." *Id.* at 165.

The Court concluded:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, when

> a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

Id. at 171-172.

The Court affirmed its commitment to the principles set out in *DelCostello* in *Reed v. Transportation Union*, 488 U.S. 319 (1989). In *Reed*, the Court was required to determine the proper limitations period for a union member's suit against the union and its officers under § 101(a)(2) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") for violation of his free speech rights. The Court held that state general or residual personal injury statutes provided the proper limitations period.[2]

Although the Supreme Court revisited the question of how to determine the appropriate limitations time for a civil federal statute that lacks an express period after *Reed*, Justice Blackmun's reformulation of the judicial inquiry did not command a majority of the Court. *See Lampf, Pleva Lipkind, et al. v. Gilbertson*, 111 S.Ct. 2773, 2778-2779 (distilling "hierarchical inquiry for ascertaining the appropriate limitations period") (1991).[3]

---

[2] The Court concluded: "Because § 101(a)(2) of the LMRDA is modeled on the First Amendment to our Constitution, there is an analogy between § 101(a)(2) claims, § 1983 claims, and state personal injury actions. . . . The well-established rule that statutes of limitation for federal causes of action not supplied with their own limitations periods will be borrowed from state law thus requires that state general or residual personal injury statutes be applied to § 101(a)(2) suits." *Reed v. Transportation Union*, 488 U.S. at 334.

[3] Justice Scalia did not join this part of Justice Blackmun's opinion. *See Lampf, Pleva Lipkind, et al. v. Gilbertson*, 111 S.Ct. at 2783 (Scalia, J., concurring in part and concurring in the judgment).

The Court of Appeals for the Third Circuit has conducted the inquiry required by *DelCostello* in a number of cases. It has applied state and federal limitations periods in those cases. *Compare Service Employees International v. City Cleaning Co., Inc.*, 982 F.2d 89 (3d Cir. 1992) (applying Pennsylvania law when deciding limitations period for union's suit to enforce a grievance committee's award under § 301 of the Federal Labor Management Relations Act of 1947) with *Haggerty v. USAir, Inc.*, 952 F.2d 781 (3d Cir. 1992) (holding that claims under the Employee Protection Program of the Airline Deregulation Act of 1978 are governed by § 10(b) of the NLRA).

As the parties have informed this Court, there are cases going both ways on the question of whether state law or § 10(b) of the NLRA provides the appropriate limitations period for a civil suit under WARN.

Cases holding that state law furnishes the correct period include *United Paperworkers v. Specialty Paperboard, Inc.*, 1993 U.S. App. LEXIS 18608 (2d Cir. July 19, 1993) (adopting Vermont statute of limitations for contract claims); *Frymire v. Ampex Corp.*, 821 F. Supp. 651 (D.Col. 1993) (adopting Colorado statute of limitations for contract claims); *Wallace v. Detroit Coke Corp.*, 818 F.Supp. 192 (E.D.Mi. 1993) (adopting Michigan statute of limitations for contract claims); *Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Services, Inc.*, 1993 U.S. Dist. LEXIS 5859 (N.D.Ill. May 3, 1993) (declining to use § 10(b) of the NLRA but not specifying state statute from which to borrow).

Cases holding that section 10(b) of the NLRA provides the proper limitations period include *News. Deliverers v. United Magazine Co.*, 809 F.Supp. 185 (E.D.N.Y. 1992), *Order granting motion for entry of judgment granted*, 1993 U.S. Dist. LEXIS 11087 (E.D.N.Y. April 10, 1993); *Staudt v. Glastron, Inc.*, 1993 US. Dist.

LEXIS 3090 (W.D.Tex. February 22, 1993); *Thomas v. North Star Steel Co., Inc.*, No. 4:CV-92-1507 (M.D. Pa. May 25, 1993).

Without recounting the discussion of the Court of Appeals for the Second Circuit in *United Paperworkers*, I follow the reasoning of the Court in that case and conclude that Pennsylvania law provides the appropriate limitations period for civil suits under the WARN Act. Neither party cites a possible analogous state statute that is shorter than two years. Because plaintiff filed its complaint less than two years before defendant's alleged termination of employees at its Perry plant, the Court does not have to determine the particular Pennsylvania statute from which to borrow. *See, e.g., Automobile Mechanics' Local No. 701*, 1993 U.S. Dist. LEXIS 5859 at * 18.

APPENDIX C

[Filed Aug. 25, 1993]

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 92-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC

v.

CROWN CORK & SEAL CO., INC.

ORDER

AND NOW, this 24 day of August, 1993, upon consideration of defendant's motion for summary judgment, the supporting and opposing memoranda thereto and the transcript of the oral argument conducted on May 20, 1993, it is hereby ORDERED that defendant's motion for summary judgment is DENIED.

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR.
J.

APPENDIX D

[Filed Sep. 19, 1993]

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 92-CV-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff,

v.

CROWN CORK & SEAL CO., INC.,
Defendant.

ORDER

AND NOW, this 16 day of Sept., 1993, upon consideration of defendant Crown Cork & Seal Co., Inc.'s Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b), and the response thereto, the Court hereby certifies that its ORDER dated August 24, 1993 denying defendant's motion for summary judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

BY THE COURT:

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR.
U.S.D.J.

[Entered 9/17/93]

APPENDIX E

STATUTES INVOLVED

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions

As used in this chapter—

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of title 45;

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss

(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the

purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, State dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C. 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period

A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless—

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss

For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

§ 2103. Exemptions

This chapter shall not apply to a plant closing or mass layoff if—

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice pursuant to section 2102(a) of this title when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act [29 U.S.C. 151 et seq.]: *Provided,* That nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States

for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term,[1] "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies

The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

§ 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

§ 2106. Procedures encouraged where not required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

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[1] So in original. The comma probably should not appear.

§ 2107. Authority to prescribe regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

§ 2108. Effect on other laws

The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act [29 U.S.C. 151 et seq.] or the Railway Labor Act [45 U.S.C. 151 et seq.].

§ 2109. Report on employment and international competitiveness

Two years after August 4, 1988, the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this chapter on employers (especially small- and medium-sized businesses), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

SUPREME COURT, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-835

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC IN OPPOSITION

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CROWN CORK & SEAL CO., INC.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC IN OPPOSITION

ARGUMENT

Respondent United Steelworkers of America, AFL-CIO-CLC ("USWA") submits this brief in opposition to the petition for certiorari filed by Petitioner Crown Cork & Seal Co., Inc. ("Crown"), in No. 94-835, which seeks review of the decision in *United Steelworkers of America v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994).

Contrary to Crown's contention, the question whether in private civil actions arising under the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109, courts should follow the presumptive rule that state law limitations apply to federal causes of action without an express limitations period, or

instead, apply the six-month statute of limitations of section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) ("10(b)"), has neither "deeply" nor "irreconcilably split the Courts of Appeals." Pet. 5.

While the appellate court decisions rejecting Crown's view—the Third Circuit's decision in the instant case, and the decision of the Second Circuit in *United Paperworkers v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993) —are final decisions, at this time there is *no* final resolution by any circuit upholding Crown's position. The Fifth Circuit, in an Order issued *sua sponte* on September 22, 1994, granted *rehearing en banc* of its decision in *Halkias v. General Dynamics*, 31 F.3d 224 (5th Cir. 1994), *reh. en banc granted*, 1994 U.S. LEXIS 26998 (Sept. 22, 1994), in which a majority of a three-judge panel of the Court, with Judge Wisdom dissenting, adopted § 10(b) as the limitations statute for WARN Act claims. In *United Mine Workers of America v. Peabody Coal Co.*, No. 93-6020 (6th Cir. Oct. 31, 1994), in which the Sixth Circuit relied on the Fifth Circuit's decision in *Halkias*, and held that WARN Act claims are subject to the six-month time limitation in § 10(b), a petition for rehearing and suggestion for rehearing *en banc* was filed November 11, 1994, and is currently pending before the Sixth Circuit. In addition, a case raising the issue of the statute of limitations for WARN Act claims is currently pending in the Tenth Circuit. *Frymire v. Ampex Corp.*, Nos. 94-1090, 94-1059 (10th Cir.). Accordingly, the circuit law on this issue is in flux and has not settled into a conflict posture. It would be premature for the Court to address this issue in the present circumstances.

This is especially true in view of the fact that this case comes before this Court in an interlocutory status. All that has occurred below is that the district court denied a motion for summary judgment in which Crown contended that this action was time-barred. After consideration of all of Crown's defenses and resolution of the case below,

if the statute of limitations issue remains a live issue, Crown will be free to seek *certiorari* at a time when it likely will be clear whether there is, in fact, a conflict between the circuits on this issue.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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No. 94-835

Supreme Court, U.S.
FILED
FEB 21 1995
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In The Supreme Court of the United States

October Term, 1994

Crown Cork & Seal Co., Inc.,
Petitioner,

v.

United Steelworkers of America,
AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 8, 1994
CERTIORARI GRANTED JANUARY 6, 1995

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The following opinions, decisions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 92-CV-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff,

v.

CROWN CORK & SEAL CO., INC.,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/15/92	Complaint. filing fee $120 receipt #383347 (mrs) [Entry date 10/16/92]
10/15/92	Summons (es) issued Forwarded to: mailed to counsel 10/16/92 (mrs) [Entry date 10/16/92]
10/15/92	Demand for jury trial by PLAINTIFF UNITED STEELWORKERS OF AMERICA (mrs) [Entry date 10/16/92]
10/15/92	MOTION & ORDER, APPOINTING SPECIAL PROCESS SERVER DEBORAH A. JOZWIAK TO SERVE THE SUMMONS AND COMPLAINT UPON THE DEFENDANT (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 10/16/92 ENTERED AND COPIES MAILED. (mrs) [Entry date 10/16/92]
10/15/92	Standard Case Management Track. (mrs) [Entry date 10/16/92]

DATE	PROCEEDINGS
10/21/92	ORDER, SET PRETRIAL CONFERENCE FOR 9:15 1/27/93 (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 10/22/92 ENTERED AND COPIES MAILED. (gn) [Entry date 10/22/92]
10/29/92	Affidavit of: Deborah A. Jozwiak re: served summons and complaint upon DEFENDANT CROWN CORK SEAL CO. Served by: certified mail on 10/23/92. (gn)
11/20/92	STIPULATION AND ORDER, EXTENDING TIME FOR DEFT TO ANSWER COMPLAINT SET ANSWER DUE FOR 12/2/92 FOR CROWN CORK SEAL CO. (Attorney: LINDA S. DWOSKIN) (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 11/20/92 ENTERED AND COPIES MAILED. (gn) [Edit date 03/15/93]
12/1/92	Answer to Complaint by DEFENDANT CROWN CORK SEAL CO. (Attorney JEROME A. HOFFMAN), Certificate of Service. (gn) [Entry date 12/02/92]
12/1/92	ISSUE JOINED. (gn) [Entry date 12/02/92]
12/3/92	Demand for jury trial by PLAINTIFF UNITED STEELWORKERS, Certificate of Service. (gn)
3/5/93	MOTION by DEFENDANT CROWN CORK SEAL CO. FOR SUMMARY JUDGMENT, MEMORANDUM, CERTIFICATE OF SERVICE. (gn) [Entry date 03/08/93]
3/12/93	MOTION by PLAINTIFF UNITED STEELWORKERS. TO EXTEND TIME TO FILE A RESPONSIVE BRIEF, CERTIFICATE OF COUNSEL, CERTIFICATE OF SERVICE. (gn)

DATE	PROCEEDINGS
3/19/93	ORDER GRANTING [9-1] MOTION TO EXTEND TIME TO FILE A RESPONSIVE BRIEF, set BRIEF DUE FOR 4/21/93 (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 3/22/93 ENTERED AND COPIES MAILED. (gn) [Entry date 03/22/93]
3/19/93	Response by DEFENDANT CROWN CORK SEAL CO. to [9-1] MOTION TO EXTEND TIME TO FILE A RESPONSIVE BRIEF, Certificate of Service. (gn) [Entry date 03/22/93]
3/24/93	SCHEDULING ORDER, PLFF'S RESPONSE TO MOTION reset to 4/21/93 for [8-1] MOTION FOR SUMMARY JUDGMENT, set DEFT'S REPLY BRIEF DUE FOR 5/5/93 (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 3/24/93 ENTERED AND COPIES MAILED. (gn)
4/21/93	Response by PLAINTIFF UNITED STEELWORKERS. to [8-1] MOTION FOR SUMMARY JUDGMENT, Certificate of Service. (gn)
5/4/93	UNOPPOSED MOTION by DEFENDANT CROWN CORK SEAL CO. TO EXTEND TIME TO FILE A REPLY BRIEF, CERTIFICATE OF SERVICE. (gn)
5/5/93	ORDER GRANTING [14-1] MOTION TO EXTEND TIME TO FILE A REPLY BRIEF, DEFT'S REPLY TO RESPONSE TO MOTION reset to 5/10/93 for [8-1] MOTION FOR SUMMARY JUDGMENT (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 5/6/93 ENTERED AND COPIES MAILED. (gn) [Entry date 05/06/93]
5/10/93	Reply by DEFENDANT CROWN CORK SEAL CO. to response to [8-1] MOTION FOR SUMMARY JUDGMENT, Certificate of Service. (gn) [Entry date 05/11/93]

DATE	PROCEEDINGS
5/20/93	Minute entry: Argued Sur: Deft's motion for Summary Judgment on 5/20/93. Deft's motion for summary judgment - C.A.V. (gn) [Entry date 05/21/93]
8/25/93	MEMORANDUM AND ORDER DENYING [8-1] MOTION FOR SUMMARY JUDGMENT (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 8/25/93 ENTERED AND COPIES MAILED. (gn)
9/3/93	MOTION BY DEFENDANT CROWN CORK SEAL CO. FOR CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. 1292(B), MEMORANDUM, CERTIFICATE OF SERVICE. (ms)
9/16/93	Response by PLAINTIFF UNITED STEELWORKERS. to [19-1] MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. 1292(B), Certificate of Service. (gn)
9/17/93	ORDER GRANTING [19-1] MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. 1292(B) (SIGNED BY JUDGE THOMAS N. O'NEILL JR.) 9/17/93 ENTERED AND COPIES MAILED. (gn)
10/13/93	Certified copy of order from USCA dated 10/13/93 re: Petition for permission to appeal is granted. (sc) [Entry date 10/14/93]
10/26/93	RECORD COMPLETE FOR PURPOSES OF APPEAL. (cc)
10/27/93	Notice of Docketing ROA from USCA Re: USCA NUMBER: 93-2008. 10/28/93 (gn) [Entry date 11/02/93]
11/1/93	Copy of TPO form (gn) [Entry date 11/02/93]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-8090

CROWN CORK & SEAL CO., INC.,
Petitioner

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1993	
Sept. 27	Petition of Crown Cork & Seal Co., Inc. for Permission to Appeal under 28 U.S.C. Section 1292 (b), rec'd. (rg)
Sept. 29	Answer received from United Steelworkers of America, AFL-CIO-CLC to Petition of Crown Cork & Seal for Permission to appeal, rec'd RG
Oct. 5	Submitted (C-37) on petition for permission to appeal. (rg)
Oct. 13	ORDER (*Mansmann*, Authoring Judge, Hutchinson and Scirica, Circuit Judges) granting petition for permission to appeal, received. (awi)
Oct. 13	CC to DC. (awi)
	TRANSFERRED TO THE GENERAL DOCKET AT NO. 93-2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-2008

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

v.

CROWN CORK & SEAL CO., INC.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/27/93	CIVIL CASE docketed
12/13/93	BRIEF on behalf of Appellant Crown Cork & Seal, Pages: 29, Copies: 10, Delivered by mail, filed. Certificate of service date 12/13/93.
12/13/93	APPENDIX on behalf of Appellant Crown Cork & Seal, Copies: 4, Volumes: 1, Delivered by mail, filed. Certificate of service date 12/13/93.
12/20/93	MOTION filed by Chamber Commerce US for leave to proceed as amicus curiae in support of Appellant. Certificate of Service dated 12/13/93. SEND TO MERITS PANEL
01/18/94	BRIEF on behalf of Appellee United Steelworkers, Pages: 44, Copies: 18, Delivered by mail, filed. Certificate of Service date 1/18/94.
02/04/94	REPLY BRIEF on behalf of Appellant Crown Cork & Seal, Copies: 10, Delivered by mail, filed. Certificate of service date 2/4/94.
03/22/94	ORDER (Cowen, Authoring Judge, Roth, Circuit Judges, Ackerman, District Judge) granting motion by Chamber of Commerce of the USA for leave to proceed as amicus curiae in support of appellant, filed.

DATE	PROCEEDINGS
03/22/94	AMICUS BRIEF on behalf of Chamber Commerce US. Pages: 12, Delivered by mail, filed. Certificate of service date 12/13/93 (see order: 3/22/94).
05/24/94	ltr per Rule 28(j)
05/24/94	ARGUED
08/10/94	OPINION filed
08/10/94	JUDGMENT entered

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 92-CV-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff,

v.

CROWN CORK & SEAL CO., INC.,
Defendant.

COMPLAINT

Plaintiff, United Steelworkers of America, AFL-CIO-CLC, (hereinafter, the "Union"), brings this action for declaratory and monetary relief against Crown Cork & Seal Co., Inc. (hereinafter, the "Company"), to secure the rights of Union-represented employees who were laid off from their employment with the Company in September, 1991. As set forth below, the Company's actions violated the Worker Adjustment and Retraining Notification Act of 1988 (hereinafter, the "WARN Act"), 29 U.S.C. § 2101 *et seq.*, which required the Company to provide the Union with 60 days notice prior to ordering a statutory plant closing or mass layoff under the WARN Act. In laying off the employees without providing the 60 days notice required by the WARN Act, the Company has deprived the employees of the statutorily mandated 60 day notice period in which to prepare for the financial and emotional travails of unemployment.

Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to Section 5(a)(5) of the WARN Act, 29 U.S.C. § 2104 (a)(5), as well as pursuant to 28 U.S.C. § 1331 and § 1337.

2. Venue over this action lies in this Court pursuant to 28 U.S.C. § 1391.

Parties

3. Plaintiff Union is the exclusive collective bargaining representative of a bargaining unit composed of certain employees of the Company within the meaning of Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) and is a representative of certain employees of the Companies within the meaning of Section 2(a)(4) of the WARN Act, 29 U.S.C. § 2101(a)(4). Plaintiff Union brings this action on behalf of the Company's Union-represented employees who were aggrieved by the Company's violation of the WARN Act described below.

4. Defendant Company's headquarters are located within this judicial district at 9300 Ashton Road, Philadelphia, Pennsylvania. Defendant Company produces or produced beverage cans at its production plant located near Perry, Georgia. The Company is an employer within the meaning of Section 2(a)(1)(A) of the WARN Act, 29 U.S.C. § 2101(a)(1)(A), employing over 100 employees at its Perry, Georgia location and hundreds more at Company owned and operated locations around the nation.

Allegations

5. The Company's Perry, Georgia plant is contained within a single physical structure and constitutes a single site of employment as that term is utilized in the WARN Act.

6. On or about September 30, 1991 the Company ordered a reduction in force and a temporary shutdown

of the Perry, Georgia plant entailing the layoff of approximately 85 Union-represented employees.

7. The reduction in force or shutdown described in paragraph 6 has exceeded six months and continues to this day.

8. The reduction in force or shutdown described in paragraph 6 resulted in an employment loss, as that term is defined by Section 2(a)(6) of the WARN Act, 29 U.S.C. § 2101(2)(a)(6), for more than 50 of the Company's employees at the Perry, Georgia plant.

9. The reduction in force or shutdown described in paragraph 6 resulted in an employment loss, as that term is defined by Section 2(a)(6) of the WARN Act, 29 U.S.C. § 2101(2)(a)(6), for more than 33% of the Company's employees at the Perry, Georgia plant.

10. The shutdown described in paragraph 6 constitutes a plant closing within the meaning of Section 2(a)(2) of the WARN Act, 29 U.S.C. § 2101(a)(2).

11. Alternatively, the reduction in force described in paragraph 6 constitutes a mass layoff within the meaning of Section (2)(a)(3) of the WARN Act, 29 U.S.C. § 2101(a)(3).

12. The Company failed to provide the notice to the Union mandated by the WARN Act of its intent to order the mass layoff or plant closing described above 60 days prior to ordering said mass layoff or plant closing, thereby violating Section 3(a) of the WARN Act, 29 U.S.C. § 2102(a).

WHEREFORE, plaintiff requests the following relief:

(1) That the Court declare that defendant has violated its statutory obligations under the WARN Act, and grant judgment for the plaintiff and against defendant;

(2) That the Court order the defendants to pay 60 days of wages and other benefits, with pre-judgment interest, to each affected employee in accordance with Section 5(a)(1) of the WARN Act, 29 U.S.C. § 2104(a)(1);

(3) That the Court award plaintiff its costs, and attorneys fees;

(4) That the Court award plaintiff such other and further relief as this Court deems just and necessary.

Respectfully submitted,

/s/ David Goldman
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Attorneys for plaintiff

DATED: 10-15-92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 92-CV-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff,

v.

CROWN CORK & SEAL CO., INC.,
Defendant.

DEFENDANT CROWN CORK & SEAL CO., INC'S ANSWER TO COMPLAINT

Defendant Crown Cork & Seal Co., Inc. ("CC&S") hereby responds to plaintiff's Complaint as follows:

Introductory Paragraph

Admitted in part, denied in part. It is admitted that plaintiff United Steelworkers of America, AFL-CIO-CLC ("Union") purportedly brings this action for declaratory and monetary relief against CC&S purportedly to secure the rights of Union represented employees who were laid off from their employment with the Company. Except as expressly admitted herein, CC&S denies the remaining averments contained in the introductory paragraph of the Complaint.

Jurisdiction and Venue

1. Admitted in part; denied in part. It is admitted that plaintiff purports to give this Court jurisdiction over this matter pursuant to Section 5(a)(5) of the WARN Act, 29 U.S.C. § 2104(a)(5), as well as pursuant to 28 U.S.C. §§ 1331 and 1337. Except as expressly admitted herein CC&S denies the remaining averments contained in paragraph 1 of the Complaint.

2. Admitted in part; denied in part. It is admitted that plaintiff purports to place venue in this Court pursuant to 28 U.S.C. § 1391. Except as expressly admitted herein, CC&S denies the remaining averments contained in paragraph 2 of the Complaint.

Parties

3. Denied. By way of further answer, the averments contained in paragraph 3 of the Complaint are conclusions of law to which no responsive pleading is required.

4. Admitted in part; denied in part. It is admitted that CC&S's corporate headquarters is located at 9300 Ashton Road, Philadelphia, PA. It is further admitted that CC&S produced beverage cans at its production plant in Perry, GA. Except as expressly admitted herein, the remaining averments contained in paragraph 4 of the Complaint are conclusions of law to which no responsive pleading is required.

Allegations

5. Admitted in part; denied in part. It is admitted that the Perry, GA plant is a single physical structure. Except as expressly admitted herein, the remaining averments contained in paragraph 5 of the Complaint are conclusions of law to which no responsive pleading is required.

6. Denied.

7. Denied.

8. Denied. By way of further answer, the averments contained in paragraph 8 of the Complaint are conclusions of law to which no responsive pleading is required.

9. Denied. By way of further answer, the averments contained in paragraph 9 of the Complaint are conclusions of law to which no responsive pleading is required.

10. Denied. By way of further answer, the averments contained in paragraph 10 of the Complaint are conclusions of law to which no responsive pleading is required.

11. Denied. By way of further answer, the averments contained in paragraph 11 of the Complaint are conclusions of law to which no responsive pleading is required.

12. Denied.

First Affirmative Defense

This Court lacks subject matter jurisdiction over some or all of the claims set forth in the Complaint.

Second Affirmative Defense

The Complaint in whole or in part fails to state a claim upon which relief can be granted.

Third Affirmative Defense

There is no basis for awarding declaratory or monetary relief under the facts and circumstances of this case.

Fourth Affirmative Defense

CC&S provided notice in compliance with WARN, 29 U.S.C. § 2102 *et seq.*

Fifth Affirmative Defense

The Complaint is barred by the applicable statute of limitations.

WHEREFORE, defendants CC&S respectfully requests that this Court enter judgment in its favor and against plaintiff on the Complaint and award it such other relief as is just and proper.

Respectfully submitted,

/s/ Jerome A. Hoffman, Esq.
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Dated: 12-1-92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 92-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff,

v.

CROWN CORK & SEAL CO., INC.,
Defendant.

DEFENDANT CROWN CORK & SEAL CO., INC.'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for the reasons set forth in the accompanying Memorandum of Law, defendant Crown Cork & Seal Co., Inc. hereby moves this Court to enter summary judgment in favor of defendant and against plaintiff.

Respectfully submitted,

/s/ Susannah R. Goodman
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Attorneys for Defendant
CROWN CORK &
SEAL CO., INC.

Dated: March 5, 1993

SUPREME COURT OF THE UNITED STATES

Nos. 94-834, 94-835

NORTH STAR STEEL COMPANY,
Petitioner

v.

CHARLES A. THOMAS, *et al.*,

CROWN CORK & SEAL CO., INC.,
Petitioner

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit granted. The cases are consolidated and a total of one hour is allotted for oral argument.

January 6, 1995

Supreme Court, U.S.
FILED
FEB 21 1995
OFFICE OF THE CLERK

(6)

No. 94-835

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

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Date: February 21, 1995

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QUESTION PRESENTED

Whether civil actions under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, are subject to the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Crown Cork & Seal Company, Inc. and respondent United Steelworkers of America, AFL-CIO-CLC, the Chamber of Commerce of the United States of America appeared in the Court of Appeals as *amicus curiae* in support of Crown. Crown has no parent company. Crown subsidiaries (other than wholly owned subsidiaries) are Crown Cork Company (Belgium) N.V., Crown Can Hong Kong, Ltd., The Crown Cork Company (East Africa) Ltd., Crown Cork del Peru, S.A., Crown Cork & Seal (Thailand) Co., Ltd., Emirates Can Company, Ltd. (Dubai, UAE), Crown Cork Company (Zambia) Limited, and Crown Cork Company (1958) (Pvt) Limited.

In the Court of Appeals, this case was consolidated with *Thomas v. North Star Steel Co.*, No. 93-7613, in which the following parties appeared: Charles A. Thomas, Darren Boop, Robert W. Bower, William D. Bridge, James Clingan, Neal B. Housner, Jonathan L. Noaker, Wayne D. Orner, Gerald W. Ranck, Harold E. Van Sickle, Jr., Richard A. Winter, Eugene L. Witmer, Sr., North Star Steel Company, and as *amici curiae*, the Chamber of Commerce of the United States of America; the Oil, Chemical and Atomic Workers International Union; the United Mine Workers of America; the NLG/Sugar Law Center for Economic & Social Justice; and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-835

CROWN CORK & SEAL CO., INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-16a) is reported at 32 F.3d 53. The opinion of the District Court on the merits (Pet. App. 17a-23a) is reported at 833 F. Supp. 467, and its order certifying the legal issue for immediate appeal under 28 U.S.C. § 1292(b) (Pet. App. 24a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1994. The petition for a writ of certiorari was filed on November 8, 1994, and was granted on January 6, 1995 (J.A. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, which is reproduced in full in the appendix to the Petition for a Writ of Certiorari (Pet. App. 25a-33a).

STATEMENT OF THE CASE

This case arises out of the closing of a unionized manufacturing plant operated by petitioner Crown Cork & Seal Company, Inc. ("Crown"). Over a year after this plant closing, respondent United Steelworkers of America, AFL-CIO-CLC (the "Union"), commenced this action for damages on the ground that Crown did not provide the advance notice required by the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. §§ 2101-09. The question now before this Court is whether the Union's WARN Act claims are subject to the six-month statute of limitations of Section 10(b) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. §160(b), or whether they are governed by some state limitations period.

A. Statutory Framework

Congress enacted the WARN Act in 1988 to provide unions, employees and local governments with advance notice of impending plant closings and mass layoffs. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a). The WARN Act generally requires employers to provide sixty days' notice of a mass layoff or plant closing to affected employees (or their union representative) and to the local government. *Id.* The notice period may be reduced if, for example, a mass layoff or plant closing results from unforeseeable business circumstances or from a natural disaster, or if an employer had been seeking business or capital to avert the closing or layoff. 29 U.S.C. § 2102(b). The WARN Act expressly provides that the

giving of notice does not violate the NLRA. 29 U.S.C. § 2108.

In virtually all cases, employees will become aware of any statutory violation immediately upon losing their job. This is so because the WARN Act's notice obligation is triggered by a defined "employment loss" within a 30-day (or in some circumstances 90-day) period. 29 U.S.C. §§ 2101(a)(2)-(3), 2102(d). The WARN Act defines "employment loss" as a termination, a layoff exceeding six months, or a 50% reduction in work hours for each month of a six-month period. 29 U.S.C. § 2101(a)(6). WARN Act notification is required only prior to a "plant closing" affecting at least 50 employees or a "mass layoff" of a third of a facility's workforce or 500 employees. 29 U.S.C. § 2101(a)(2)-(3). Such a dramatic reduction in force cannot be easily concealed. Hence, affected employees will be aware of a possible WARN Act claim immediately upon job loss or, at the latest, six months after a plant closing or mass layoff.

The WARN Act creates a private cause of action for employees or their union representative, who can sue an employer for statutorily-specified money damages in any district where the employer transacts business. 29 U.S.C. § 2104. The Act, however, does not specify the statute of limitations that governs such claims. Accordingly, this Court must "borrow" a limitations period for WARN Act claims from elsewhere.

B. Facts And Proceedings Below

Crown is a national manufacturer of cans and ends for the food and beverage industries. It manufactures its products in more than 50 plants located throughout the continental United States. Crown products are sold in every state of the Union and in many countries abroad.

On or about September 30, 1991, Crown ordered a shutdown of its unionized manufacturing plant in Perry, Georgia. (J.A. 9). As a result, Crown laid off ap-

proximately eighty-five Union represented employees at the plant. (J.A. 10). The Union alleges that Crown failed to provide it with 60 days' advance notice of the shutdown. (J.A. 10). Crown denies the Union's allegations and maintains that it "provided notice in compliance with WARN." (J.A. 14). On October 15, 1992, more than a year after the shutdown, the Union instituted this action. It chose to sue Crown in the United States District Court for the Eastern District of Pennsylvania, rather than in Georgia, the site of the relevant employment action.

Crown moved for summary judgment on the ground that the Union's claim was time-barred because WARN Act actions were governed by the six-month limitations period contained in Section 10(b) of the NLRA, 29 U.S.C. § 160(b).

C. The District Court's Decision

In a Memorandum and Order dated August 24, 1993, the District Court denied Crown's motion for summary judgment. (Pet. App. 17a-23a). The District Court concluded that some Pennsylvania state limitations period, rather than the NLRA, provided the applicable limitations period for the Union's WARN Act claim. (Pet. App. 21a-22a). The Court declined to decide, however, which Pennsylvania limitations period applied. (Pet. App. 22a). Recognizing that the issue before it involved a controlling question of law as to which there was substantial ground for difference of opinion, the District Court certified its decision for immediate appeal. (Pet. App. 24a).

D. The Decision Of The Court Of Appeals

The United States Court of Appeals for the Third Circuit affirmed. (Pet. App. 1a-16a). The Court recognized that the WARN Act and the NLRA both imposed on employers the obligation to provide notice of plant closings, and that the WARN Act bore a "family resem-

blance" to the NLRA. (Pet. App. 10a). The Court also acknowledged that none of four proposed Pennsylvania limitations periods "provide perfect analogies to WARN." (Pet. App. 15a). Nevertheless, the Court declined to borrow the NLRA's limitations provision and ruled instead that the Union's suit was subject to a state limitations period, though the Court refused to decide which of the four proposed limitations periods applied. (Pet. App. 15a-16a).

The Court of Appeals recognized that the WARN Act's broad venue provision allowed the Union to sue Crown in Pennsylvania for an alleged WARN Act violation which occurred in Georgia, and that WARN Act claims likely would be subject to a limitations period from the forum state, *i.e.* Pennsylvania. (Pet. App. 14a n.4). Nonetheless, the Court downplayed the risk of forum shopping created by its refusal to adopt a uniform limitations period for WARN Act claims; despite the fact the plaintiff in this case filed suit over 700 miles from the affected plant, the Court asserted that "workers will gain few advantages by suing in a court far from the site of injury." (Pet. App. 14a) (quoting *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 56 (2d Cir. 1993)).

SUMMARY OF ARGUMENT

I. Currently before the Court is the issue of the appropriate limitations period for the WARN Act, a federal notice statute which does not contain an express statute of limitations. In recent borrowing decisions, this Court has consistently scrutinized both state and federal statutes to determine which offered the "closer analogy" to the cause of action at issue, and then borrowed a limitations period from that statute, be it state or federal, if the limitations period was consistent with federal policies and litigation practicalities. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Though this Court has articulated a "fallback"

presumption that Congress intended for state law to serve as the primary borrowing source, that presumption should not apply where a federal statute clearly provides the best analogy to the cause of action in question and where borrowing a uniform federal limitations period furthers federal interests in uniformity and certainty and minimizes the danger of forum shopping.

II. The NLRA offers the best analogy to the WARN Act in state or federal law. It is, therefore, an appropriate borrowing source for the WARN Act. The NLRA and the WARN Act both require employers to provide advance notice of impending plant closings or mass layoffs. They also share common language and a common purpose. Both aim to ameliorate the effects of unemployment and to strike a balance between the interests of employers in operating their businesses and employees who suffer the consequences of managerial actions. Indeed, the WARN Act's legislative history confirms that Congress intended to model the WARN Act on the NLRA.

In contrast to the NLRA, no nationally available state law cause of action provides a suitable analogy to the WARN Act. The WARN Act is a statutory creation without common law roots. Therefore, it is not surprising that state law does not afford a cause of action with the "commonality of purpose" and "similarity of elements" which the WARN Act shares with the NLRA.

III. Federal policies and the practicalities of WARN Act litigation favor borrowing the limitations period from the NLRA. The WARN Act seeks to provide prompt relief to affected employees; this hinges upon a limitations period that encourages prompt litigation. Borrowing the NLRA's limitations period also furthers the federal policy favoring the rapid resolution of employment disputes. In addition, given the WARN Act's broad venue provision and its multi-state character, state-law borrowing would encourage forum shopping, undermine uniformity, and foster time-consuming and expensive collateral litigation. Finally, the subject matter of WARN

Act litigation—plant closings and mass layoffs—favors a short limitations period. Following a plant closing, terminated employees and witnesses disburse, and records may be lost or destroyed. Numerous plaintiffs, both represented and unrepresented, have instituted WARN Act lawsuits within six months, confirming that a six-month limitations period is both feasible and appropriate.

ARGUMENT

I. COURTS SHOULD BORROW THE LIMITATIONS PERIOD FROM THE CLOSEST ANALOGY IN STATE OR FEDERAL LAW UNLESS FEDERAL POLICIES AND LITIGATION PRACTICALITIES REQUIRE A DIFFERENT COURSE

Congress often fails to provide express limitations periods for federal causes of action. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). In such circumstances, this Court does not ordinarily "assume that Congress intended that there be no time limit on actions at all." *Id.* Rather, this Court " 'borrow[s]' the most suitable statute or other rule of timeliness from some other source." *Id.* This Court has created a two-step borrowing analysis. First, this Court searches for the closest analogy to the cause of action in question. Second, this Court considers whether borrowing the limitations period from the closest analogy is consistent with federal policies and litigation practicalities.

A. Courts Should First Attempt To Determine Which Of The Competing Statutory Alternatives Offers The Closest Analogy To The Federal Statute In Question

1. *After Scrutinizing Both State And Federal Statutes, This Court Has Routinely Borrowed The Limitations Period Contained In The Most Analogous Statute*

In recent limitations borrowing decisions, this Court has scrutinized both state and federal statutes to determine which offered the "closer analogy" to the cause of

action at issue, and then borrowed a limitations period from the statute—either state or federal—that provided the best analogy, so long as the limitations period was consistent with federal policies and litigation practicalities. For example, in *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), this Court applied a Clayton Act limitations period to civil RICO claims because RICO and the Clayton Act shared "similarities in purpose and structure," while there was no "satisfactory state law analogue to RICO." *Id.* at 152.

Similarly, in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court ruled that the NLRA provided an analogy to "hybrid" claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "more apt than any of the suggested state-law parallels." *Id.* at 169. And in *Reed v. United Transportation Union*, 488 U.S. 319 (1989), this Court borrowed state limitations periods for claims under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2), because the claims were "readily analogized . . . to state personal injury actions," *id.* at 326, and federal law "d[id] not supply a more analogous statute," *id.* at 334.

2. *Courts Should Not Presume That State Limitations Periods Govern When There Are More Analogous Federal Statutes Of Limitations*

This Court has categorically rejected the suggestion that "federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period." *Agency Holding Corp.*, 483 U.S. at 146. On occasion, this Court has stated that, as a "fallback rule of thumb," it has presumed that Congress intended for courts to borrow the most analogous limitations period from state law. *DelCostello*, 462 U.S. at 158 & n.12; *see, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991) (plurality opin-

ion) [hereinafter *Lampf*]; *Agency Holding Corp.*, 483 U.S. at 147. Nevertheless, this Court has often borrowed a limitations period for a federal cause of action from elsewhere in federal law. *See, e.g., Lampf*, 501 U.S. at 355; *Agency Holding Corp.*, 483 U.S. at 156; *DelCostello*, 462 U.S. at 169; *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958).

In fact, it is questionable how weighty the "fallback" presumption of state law borrowing should be, and whether it should apply at all in this case. First, the borrowing of state limitations periods is not mandated by the Rules of Decision Act, 28 U.S.C. § 1652, or any other aspect of federal law. *See, e.g., DelCostello*, 462 U.S. at 159 n.15; *id.* at 174 n.1 (O'Connor, J., dissenting). Rather, the practice of state law borrowing developed as an "intensely practical solution[] to a practical problem in the administration of justice." *McAllister*, 357 U.S. at 229 (Brennan, J., concurring). As Justice Brennan explained:

> In *the absence of any comparable federal statute of limitations* which might be applied, the Court had four choices: (1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations. *The state statutes were chosen by default.*

Id. (emphasis added). There is little reason to apply a default rule which developed in "the absence of any comparable federal statute of limitations," when a federal cause of action actually has a close analogy in federal law.

Second, Congress passed the WARN Act in 1988, after this Court had circumscribed its presumption of state law borrowing and selected uniform federal limitations periods for civil RICO claims and for hybrid § 301 claims. *Agency Holding Corp.*, 483 U.S. at 150; *DelCostello*, 462 U.S. at 172. This Court should not presume that Congress, which adopted the WARN Act to provide prompt

notice and relief from the rigors of unemployment, would consign WARN Act claims to the vagaries of, and collateral litigation regarding, diverse state limitations periods. To the contrary, it is reasonable to conclude that Congress intended for this Court to select a limitations period from a statute with "similarities in purpose and structure," regardless of whether that statute was state or federal. *Agency Holding Corp.*, 483 U.S. at 152.[1]

B. Courts Should Ensure That The Limitations Period From The Closest Analogy Is Consistent With Federal Policies And Litigation Practicalities

Courts should borrow a limitations period from the best analogy, be it state or federal, so long as the limitations period is consistent with federal policies and litigation practicalities. *See Agency Holding Corp.*, 483 U.S. at 153; *DelCostello*, 462 U.S. at 172. In applying the second part of this standard, this Court has identified three key areas of inquiry: (1) whether a uniform limitations period is needed "to avoid intolerable 'uncertainty and time-consuming litigation,'" *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)); (2) whether the use of varying state limitations periods would "'present the danger of forum shopping and, at the very least, would virtually guarante[e] . . . complex and expensive litigation . . . over what should be a straightforward matter,'" *Lampf*, 501 U.S. at 357 (quoting *Agency Holding Corp.*, 483 U.S. at 154) (internal quotations omitted); and (3) whether the federal limitations period is "designed to accommodate a balance of interests very similar to that at stake" in the cause of action at issue. *DelCostello*, 462 U.S. at 169.

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[1] This Court has described federal borrowing as a "closely circumscribed exception," because of congressional awareness of this Court's state law borrowing practice. *See, e.g., Lampf*, 501 U.S. at 356; *Agency Holding Corp.*, 483 U.S. at 147. Congressional expectations likely changed, however, after this Court borrowed federal limitations periods in *DelCostello* and *Agency Holding Corp.* Hence, in this case, there should not be a strong presumption favoring state law borrowing.

Moreover, in assessing the federal policies at stake and the practicalities of litigation, this Court should recognize that borrowing a uniform federal limitations period generally furthers "federal interests in uniformity, certainty, and the minimization of unnecessary litigation," *see Wilson v. Garcia*, 471 U.S. 261, 275 (1985); the use of state limitations periods almost always creates the danger of forum shopping. *Agency Holding Corp.*, 483 U.S. at 154. Accordingly, when the closest analogy to a federal cause of action is found elsewhere in federal law, courts generally should borrow a uniform federal limitations period.

II. THE NLRA OFFERS A CLOSER ANALOGY TO THE WARN ACT THAN ANY STATE LAW ALTERNATIVE

Because the NLRA offers the best analogy to the WARN Act in state or federal law, and because federal policies and litigation practicalities favor a uniform limitations period for WARN Act claims, this Court should borrow the NLRA's six-month limitations period for the WARN Act. The NLRA, unlike any one state law cause of action, offers the closest analogy to the WARN Act.[2] The WARN Act and the NLRA both require employers to provide advance notice of impending plant closings or mass layoffs. Not only do the two statutes impose overlapping duties nationwide, they also have common language and a common purpose.

Indeed, the WARN Act's legislative history reveals an intent to pattern the WARN Act after the requirements

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[2] Specialized state statutes, such as the handful of state plant closing laws, offer inappropriate borrowing sources. Because such specialized analogies are not available in most states (including Pennsylvania and Georgia), they could not be borrowed nationwide. As a result, claims would have to be characterized differently on state-by-state basis. The resulting "[t]ime-consuming litigation as to the collateral question of the appropriate statute of limitations" would create uncertainty and deter potential plaintiffs from filing suit. *See Reed*, 488 U.S. at 326.

of the NLRA. The same cannot be said of any state law cause of action. Thus, the NLRA provides the "closest fit" with the WARN Act and therefore offers a more appropriate borrowing source than any state law alternative. *See Agency Holding Corp.*, 483 U.S. at 148; *DelCostello*, 462 U.S. at 171-72.

A. The NLRA And The WARN Act Both Require Advance Notice Of Plant Closings

The overall objectives of national labor policy, "reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964). Accordingly, the NLRA, the keystone of federal labor law, "confer[s] certain affirmative rights on employees and [places] certain enumerated restrictions on the activities of employers." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965).

Among the protections the NLRA affords the American represented workforce is the right to receive advance notice of an impending plant closing, relocation, or other similar managerial action. This is required in order to ensure a meaningful opportunity to bargain over the effects of that action. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981) (advance notice required to bargain over effects of plant closing); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983); *see also Dubuque Packing Co.*, 303 N.L.R.B. 386, 396-97 (1991) (advance notification required for decisional bargaining over work relocation), *enf'd*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 1395, *cert. dismissed*, 114 S. Ct. 2157 (1994). A failure to provide this statutorily required notice constitutes an unfair labor practice subject to the NLRA's six-month limitations period. *See* 29 U.S.C.

§ 158(a)(5); *First National Maintenance Corp.*, 452 U.S. at 681.[3]

Thus, long before the WARN Act became law, employers with represented employees were already providing advance notice of plant closings and mass layoffs to comply with their statutory obligations under the NLRA. In a sense, the WARN Act simply standardized the notice required for represented employees and extended the notice requirement to cover both represented and unrepresented employees. *See Halkias v. General Dynamics Corp.*, 31 F.3d 224, 232 (5th Cir.), *rehearing en banc granted*, 31 F.3d 248 (5th Cir. 1994).

Moreover, the WARN Act shares a common purpose with the NLRA. The NLRA's advance notice requirement protects employees from sudden dislocation and enables unions to secure additional benefits for their members. *See First National Maintenance Corp.*, 452 U.S. at 681-82; *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306-07 (8th Cir. 1988); *see also Riedel International*, 300 N.L.R.B. at 282-83 (advance notice and bargaining required to ameliorate effects on employees of sale of company and cessation of operations). Indeed, this Court has recognized that unions often have intervened before a plant closing to save a failing business "by lending technical assistance, reducing wages and benefits or increasing production and even loaning part of earned wages to forestall closures." *First National Maintenance Corp.*, 452 U.S. at 681 n.19.

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[3] Although the NLRA does not specify the amount of pre-implementation notice required, it must be sufficiently in advance of the closing to allow meaningful negotiations. *See, e.g., Penntech Papers, Inc.*, 706 F.2d at 26 ("A concomitant element of 'meaningful' bargaining is timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible."); *Daniel I. Burk Enterprises, Inc.*, 313 N.L.R.B. 1263, 1268 (1994); *Riedel International*, 300 N.L.R.B. 282, 284 (1990); *Los Angeles Soap Co.*, 300 N.L.R.B. 289, 295 (1990); *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 n.14 (1986), *enf'd*, 819 F.2d 1130 (2d Cir. 1987).

The WARN Act's notice requirement also affords unions, employees, and local governments the opportunity to act promptly to ameliorate the hardships of unemployment, whether by meeting with the employer to offer incentives to remain open, or by offering postemployment training or other unemployment assistance to affected employees. *See, e.g.*, 20 C.F.R. § 639.1(a); Labor Department's Statement and Final Regulations on the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16042, 16046 (1989).[4]

There are other similarities in structure between the NLRA and the WARN Act. Under both statutes, the amount of notice may be reduced when an employer can demonstrate special or emergency circumstances. The WARN Act contains three such exceptions. *See* 29 U.S.C. § 2102(b); 20 C.F.R. § 639.9; 54 Fed. Reg. at 16061-63.[5] The NLRA also allows for a reduction in the notice

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[4] Both the NLRA and the WARN Act afford protection not only to the affected employee but the community at large as well. The NLRA proscribes management practices "which affect commerce and are inimical to the general welfare," 29 U.S.C. § 141(b), while the WARN protects both individual workers and local communities. 20 C.F.R. § 639.1(a) ("WARN also provides for notice to State dislocated worker units so that dislocated workers assistance can be promptly provided."); *see also Comments Submitted to the Labor Department in Response to Its Policy Paper on the Worker Adjustment and Retraining Notification Act*, 228 Daily Lab. Rep. (BNA), Nov. 28, 1988, at E-1 (WARN Act's principal authors "emphasize that WARN is a remedial statute intended to provide significant protection to workers and local communities.").

[5] The WARN Act's faltering company exception allows for reduction in the notice period if "the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business. 29 U.S.C. § 2102(b)(1). The unforeseeable business circumstances exception provides for reduced notice in the event that the closing or mass layoff "is caused by business circumstances that were not reasonably foreseeable as of the time

period in emergency circumstances. *See, e.g., Daniel I. Burk Enterprises, Inc.*, 313 N.L.R.B. at 1268 (providing examples of circumstances permitting reduced notice); *Los Angeles Soap Co.*, 300 N.L.R.B. at 295-96 (same).[6]

The NLRA and the WARN Act also provide analogous remedies for violations of their respective notice requirements. Failure to provide advance notice required by the WARN Act requires payment of back pay and benefits for each day of the violation. 29 U.S.C. § 2104(a)(1). Similarly, an employer's failure to provide advance notice or otherwise to satisfy its effects bargaining obligations under the NLRA constitutes an unfair labor practice, for which back pay is the usual remedy. *See, e.g., Daniel I. Burk Enterprises, Inc.*, 313 N.L.R.B. at 1272; *National Car Rental System, Inc.*, 252 N.L.R.B. 159, 164 (1980), *modified and enf'd*, 672 F.2d 1182 (3d Cir. 1982).[7]

B. Legislative History Confirms That Congress Modeled The WARN Act On The NLRA

Congress's intention to model the WARN Act on the NLRA and to use the WARN Act to extend the NLRA's notice protection to unrepresented employees is evident

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that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). Finally, the natural disaster exception excuses notice in the event that the closing or mass layoff is caused by a natural disaster such as a flood, earthquake, or drought. 29 U.S.C. § 2102(b)(2)(B).

[6] Circumstances in which the NLRA's notice requirement has been excused include the sudden refusal of an employer's bank to continue extending credit, *Raskin Packing Co.*, 246 N.L.R.B. 78, 80 (1979), the unanticipated denial of an employer's loan request, *M & M Transportation Co.*, 239 N.L.R.B. 73, 75 (1978), and a bankruptcy trustee's closure of a business and termination of employees, *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

[7] Applying state limitations periods to WARN Act claims would allow two different limitations periods to govern claims for the very same "failure to give notice." A union must raise its NLRA claim within six-months, but it will have a different (and probably lengthier) period to raise the same claim under the WARN Act.

not only from its express references to the NLRA in the WARN Act's statutory language, *see, e.g.*, 29 U.S.C. §§ 2103(2) and 2108 (thrice referencing the NLRA), but also from the debates regarding the WARN Act and its predecessor bills. The "clearest current" in the legislative history of the WARN Act is the reliance on the NLRA model, providing strong support for incorporation of the NLRA's six-month limitations period into the WARN Act. *See Agency Holding Corp.*, 483 U.S. at 151.

The principal precursors of the WARN Act introduced in the 100th Congress would have required employers not only to notify but also to consult with employees or their exclusive representative before closing a plant. S. 538, 100th Cong., 1st Sess. (1987); H.R. 1122, 100th Cong., 1st Sess. (1987). In other words, the initial formulation of the WARN Act was identical to the NLRA's purpose of requiring that employers both notify and consult or bargain with employees prior to a plant closing. The House Committee on Education and Labor observed that the consultation requirement in H.R. 1122 expanded upon the NLRA's effects bargaining requirement:

> [T]here are a number of important similarities between the duty to consult and the NLRA duty to bargain. Like the bargaining obligation, the duty to consult requires the employer to meet with the union, without preconditions, "at reasonable times" and as often necessary to conduct a thorough exploration of alternatives, and the employer must be represented by one who has sufficient authority to conduct meaningful bargaining. . . .
>
> Most important of all, the employer must approach the consultation process with a good-faith willingness to explore the reasons for and possible alternatives to the proposed closing or mass layoffs.

H.R. Rep. 285, 100th Cong., 1st Sess. 34 (1987).[8] Ultimately, congressional proponents of plant closing legis-

[8] The principal sponsor of the WARN Act in the House of Representatives noted that the legislative history of the WARN Act "is

lation eliminated the consultation requirement to garner additional support. *See, e.g.*, 134 Cong. Rec. 17,867-68 (1988) (remarks of Rep. Ford); 134 Cong. Rec. 13,680-81 (1988) (remarks of Sen. Metzenbaum).[9]

Nevertheless, Congress believed that even a notice requirement would encourage bargaining over the effects of a plant closing. The House committee report noted that

> pre-notification . . . provide[s] an opportunity for the employer and the representative of the affected employees to explore alternatives to a proposed closing or mass layoff, thereby providing employees an opportunity to discuss the reason for decisions that will have a tremendous impact on their lives.

H.R. Rep. 285, 100th Cong., 1st Sess. 32 (1987).

Likewise, the Senate committee report on the WARN Act's precursor observed that notice of a plant closing "may afford an opportunity . . . for ameliorative measures to be considered." S. Rep. 62, 100th Cong., 1st Sess. 22-23 (1987). Congress's desire to have the WARN Act en-

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simply provided through the Committee reports on S. 538 and H.R. 1122, and the conference report on H.R. 3." 134 Cong. Rec. 17,868 (1988) (remarks of Rep. Ford).

[9] The consultation requirement was eliminated from S. 538 in committee. *See* 133 Cong. Rec. 18,880 (1987) (remarks of Sen. Kennedy). The Senate then added a revised version of S. 538 as an amendment to H.R. 3, the Omnibus Trade and Competitiveness Act of 1987. The House-Senate conference on H.R. 3 included a modified plant closing provision in the final trade legislation. *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1045-55 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 2078-88. The House and Senate adopted the trade legislation, but it was vetoed by President Reagan. *See* H.R. Doc. No. 200, 100th Cong., 2d Sess. (1988), *reprinted in* 134 Cong. Rec. 12,130 (1988). The plant closing provisions of H.R. 3 were then introduced as S. 2527, the WARN Act. Following amendment on the Senate floor, the WARN Act was approved by Congress and became law without the President's signature. *See generally* Christopher P. Yost, *The Worker Adjustment and Retraining Notification Act of 1988: Advanced Notice Required?*, 38 Cath. U. L. Rev. 675, 691 (1989).

courage effects bargaining reveals that the NLRA was in fact a foundation for the final version of the WARN Act.[10]

C. The Department Of Labor And The Federal Courts Have Recognized The Close Relationship Between The WARN Act And The NLRA

Given Congress's intent to model the WARN Act on the NLRA and the consequent overlap in the statutes' duties and purposes, the Department of Labor naturally borrowed extensively from the NLRA in promulgating WARN Act regulations. *See, e.g.*, 20 C.F.R. § 639.3 (a)(2) (defining "independent contractors and subsidiaries" by reference to "existing legal rules"); 54 Fed. Reg. at 16045 (looking to NLRA for guidance in promulgating definition of "independent contractors and subsidiaries" in 20 C.F.R. § 639.3(a)(2)); 54 Fed. Reg. at 16044-45 (discussing promulgation of "reasonable expectation of recall" language in 20 C.F.R. § 639.3(a)(1)(i) by referring to NLRA case law).

In fact, after the WARN Act's enactment, the NLRB's General Counsel "predicted substantial interplay between the new law [the WARN Act] . . . and the nation's basic labor law administered by the NLRB." *NLRB General Counsel Outlines Overlap Between Plant Closing Law and Taft-Hartley*, 226 Daily Lab. Rep. (BNA), Nov. 23, 1988, at A-3.[11]

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[10] If the original bill's consultation requirement had survived, the analogy to NLRA-mandated effects bargaining would be unmistakable. Congress decided to accommodate business by requiring only notice, and not consultation, in the WARN Act.

[11] The following excerpt from then NLRB General Counsel Rosemary M. Collyer is illustrative:

> I think the two statutes are intended by Congress to operate essentially separately, but I think because of the borrowing of concepts, one from the other, and because of the impact on existing and future collective bargaining relationships that this statute requires . . . it is inevitable that there will be a fair amount of interplay between the [two laws].

226 Daily Lab. Rep. (BNA), Nov. 23, 1988, at A-3 (brackets in original).

This prediction has materialized. The federal courts, like the Department of Labor, have borrowed extensively from the NLRA—not just to identify a limitations period for WARN Act claims—but to fill other gaps in the WARN Act as well. *See, e.g., Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1283 (5th Cir. 1994) (citing NLRB principles regarding back pay), *cert. denied*, 63 U.S.L.W. 3562 (U.S. Jan. 24, 1995); *Damron v. Rob Fork Mining Corp.*, 945 F.2d 121, 124 (6th Cir. 1991) (analyzing WARN Act's "reasonable expectation of recall" language according to NLRB guidelines); *Washington v. Aircap Indus., Inc.*, 860 F. Supp. 307, 312 (D.S.C. 1994) (citing NLRB principles regarding "back pay"); *Bradley v. Sequoyah Fuels Corp.*, 847 F. Supp. 863, 868 (E.D. Okla. 1994) (applying NLRB guidelines regarding "temporary layoff" and "reasonable expectation of recall"); *United Mine Workers of Am., Dist. 2 v. Florence Mining Co.*, 855 F. Supp. 1466, 1479 n.18 (W.D. Pa. 1994) (citing NLRB principles regarding single-employer test); *Washington v. Aircap Indus. Corp.*, 831 F. Supp. 1292, 1296 (D.S.C. 1993) ("If the [WARN Act] regulations are not definitive, it may be appropriate to borrow definitions and factors employed by the [NLRB]."); *Local 397, Int'l Union of Electronic Workers v. Midwest Fasteners, Inc.*, 779 F. Supp. 788, 796 (D.N.J. 1992) (applying NLRB principles in single-employer analysis).

D. The NLRA And The WARN Act Protect Both Represented And Unrepresented Employees

Despite the commonality of purpose and similarity of elements between the NLRA and the WARN Act, the Third Circuit rejected the analogy by asserting that the WARN Act provides a substantive right to all employees, while the NLRA merely protects the collective bargaining process. (Pet. App. 10a). In doing so, the Third Circuit misapprehended this Court's borrowing analysis and demonstrated a fundamental lack of understanding of the substantive breadth and purpose of both the NLRA and the WARN Act.

First, a strict identity of purposes is not a prerequisite for importing a limitations period from one federal statute to another. If this were the case, no federal limitations period would ever serve as a borrowing source, because no two federal statutes are perfectly analogous, *i.e.* there will always be some substantial difference between different federal statutes. Indeed, in *Agency Holding Corp.*, this Court held that civil RICO claims were subject to the four-year limitations period from the Clayton Act, notwithstanding the different purposes of the two statutes, *e.g.* the Clayton Act is directed against anticompetitive activity, while RICO is directed against organized crime. *See Agency Holding Corp.*, 483 U.S. at 151.

Second, as noted above, Congress intended that the WARN Act would provide not only a substantive right to employees, but also "provide an opportunity for the employer and the representative of the affected employees to explore alternatives to a proposed closing or mass layoff." H.R. Rep. 285, 100th Cong., 1st Sess. 32 (1987). Thus, the WARN Act was intened to offer a process to explore alternatives to imminent dislocation, as well as substantive rights.

Third, while the NLRA does facilitate collective bargaining, it also protects the individual right of all employees, both represented and unrepresented, to engage in concerted action for mutual aid or protection. *See* 29 U.S.C. §§ 151, 157. Indeed, Section 7 of the NLRA ensures that both represented and unrepresented workers have the right to act together, outside of the collective bargaining process and even outside of the immediate employer-employee relationship, to improve working conditions. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-67 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).[12] Notably, WARN Act notice may induce con-

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[12] The ambit of Section 7 is extremely broad. Employee activity is protected so long as it is of a "concerted" nature, even if it is

certed activity protected by the NLRA as workers attempt to save their jobs. *See* S. Rep. No. 62, 100th Cong., 1st Sess. 11 (1987) (noting that advance notice of one plant closing "allowed workers enough time to purchase the plant and turn its fortunes around").

In sum, the WARN Act is an outgrowth of the NLRA that extends the right to advance notice of plant closings to both represented and unrepresented employees. The NLRA and the WARN Act share a common purpose and similar elements. Because these two interrelated federal labor statutes both aim to ameliorate the hardships of impending employment loss, the NLRA provides an obvious analogous source for the WARN Act's statute of limitations.

E. State Law Offers No Analogy To The WARN Act

The WARN Act is a statutory creation without common law roots. Thus, not surprisingly, in contrast to the NLRA, no state law cause of action provides any analogy to the WARN Act. The Court of Appeals for the Third Circuit was unable to fix upon any single analogous state statute and instead vaguely proffered four possible Pennsylvania limitations periods: (1) the six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527; (2) the four-year limitations period for breach of contract, 42 Pa. Cons. Stat. Ann. § 5525; (3) the two-year limitations period for an action for a civil penalty, 42 Pa. Cons. Stat. Ann. § 5524(5); and (4) the three-year limitations period of the Pennsylvania Wage Payment and

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unrelated to union organization or the collective bargaining process. *See, e.g., NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 841 (1984) (truck driver's refusal to drive unsafe truck was protected concerted activity); *Eastex, Inc.*, 437 U.S. at 569-70 (union's attempted distribution of newsletter urging employees to oppose state right-to-work statute was protected concerted activity); *Washington Aluminum Co.*, 370 U.S. at 15 (unrepresented employees who walked off the job because it was too cold engaged in protected concerted activity); 1 Hardin, *The Developing Labor Law*, 72-73, 137-146 (3d ed. 1992).

Collection Law, 43 Pa. Stat. Ann. § 260.9a(g). Absent from all of these options is the "commonality of purpose" and "similarity of elements" which the WARN Act shares with the NLRA. Indeed, even a cursory examination of the above limitations periods leaves little doubt that the NLRA provides a far closer analogy than the state laws identified by the Court below, which in essence provides no analogy at all.

1. *Pennsylvania's Residual Statute Of Limitations Is An Unsuitable Analogy To The WARN Act*

Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527, should be rejected as a borrowing source for several reasons. First, in *Agency Holding Corp.*, this Court rejected the use of Pennsylvania's residual limitations period as a suitable borrowing source, noting that it is "unlikely that Congress would have intended such a statute of limitations to apply." 483 U.S. at 153. Indeed, a residual limitations period "in essence provides no analogy" at all. *United Mine Workers of Am. v. Peabody Coal Co.*, 38 F.3d 850, 856 (6th Cir. 1994).

Moreover, not all states have residual limitations periods, and it would therefore be impossible to borrow these periods on a uniform basis. *Agency Holding Corp.*, 483 U.S. at 153. For these reasons, Pennsylvania's residual limitations period is an inappropriate borrowing source for the WARN Act. Undeniably, it is less analogous to the WARN Act than the limitations period of the NLRA.

2. *A WARN Act Claim Is Not Analogous To A Contract Claim*

The WARN Act is a statute designed to provide notice to dislocated workers, their representatives and local government so that assistance can quickly be provided. 29 U.S.C. § 2102; 20 C.F.R. §§ 639.1, 639.2. The WARN Act makes no provisions for contractual dam-

ages, and it does not by its own terms alter or affect any contractual rights. *See* 29 U.S.C. §§ 2104(a)(2)(B), 2105; 20 C.F.R. § 639.1(g).

Indeed, the WARN Act lacks all indicia of contract. There is no bargain to be struck, no *quid pro quo*. An employee has no obligation, for example, to continue to work for a sixty-day or other period in exchange for WARN Act notice. With no bargain, no meeting of the minds, and no consideration, the WARN Act cannot plausibly be said to create obligations analogous to those imposed by contract.

Moreover, the WARN Act requires an employer to notify not only employees, but also governmental units with whom the employer has had no prior contractual relationship. 29 U.S.C. § 2102(a). Contract claims have different purposes and elements than WARN Act claims and provide an inapt analogy for statute of limitations borrowing purposes.

3. *The WARN Act Is Neither Analogous To The Pennsylvania Civil Penalty Provision Nor To The Pennsylvania Wage Payment And Collection Law*

Pennsylvania provides a two-year statute of limitations for "[a]n action upon a statute for a civil penalty or forfeiture." 42 Pa. Cons. Stat. Ann. § 5524(5). This limitations period is an inappropriate borrowing source for two reasons.

First, the Union seeks to recover compensatory damages, not a civil penalty. Under the WARN Act, employees are entitled to back pay and certain benefits for the period of the violation, 29 U.S.C. § 2104(a)(1); this is a simple way to approximate the damages caused by a WARN Act violation. Thus, the WARN Act provides only "a limited *compensatory* damage remedy" to employees. *Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185, 192 (E.D.N.Y. 1992)

(emphasis added); *see also Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 464 (S.D.N.Y. 1989) (characterizing payments to employees under the WARN Act as "compensatory damages"). It is well settled that compensatory damages are not penalties. *See, e.g., Tull v. United States*, 481 U.S. 412, 422 (1987); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656 n.10 (1983).

Moreover, the WARN Act describes an employer's liability to an employee as "back pay." 29 U.S.C. § 2104 (a)(1)(A). Congress is presumed to know the meaning of the words it uses and to intend their plain and ordinary application. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). Congress clearly could have, but did not, label the employer's liability to the employee as a "penalty."

Second, the civil penalty limitations period was not crafted to apply to notice obligations, which is the WARN Act's purpose. 29 U.S.C. § 2102; 20 C.F.R. §§ 639.1, 639.2. There is no identity of purpose between the WARN Act and a statute providing for a civil penalty or forfeiture.

Pennsylvania's Wage Payment and Collection Law, 43 Pa. Stat. Ann. § 260.1 *et seq.* ("WPCL"), allows employees to recover earned but unpaid wages and benefits. 43 Pa. Stat. Ann. § 260.3. It contains a three-year limitations period, 43 Pa. Stat. Ann. § 260.9a(g), which is also an inappropriate borrowing source for the WARN Act.

First, the purpose of the WPCL is to limit an employer's ability to defer unfairly the payment of compensation that has already been earned by the employee. *See Emgee Engineering Co. v. Unemployment Compensation Bd. of Review*, 30 Pa. Commw. 290, 293-94, 373 A.2d 779, 781-82 (1977). This has no relation to the WARN Act's purpose, which is the provision of advance notice of plant closings and mass layoffs.

Second, WPCL claims are premised on a contractual obligation. An employee may recover only wages previously *earned*. *Id.; Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir. 1990) (WPCL provides a "remedy when the employer breaches a contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned."); *Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577, 1579 (E.D. Pa. 1985) (same), *aff'd*, 800 F.2d 1138 (3d Cir. 1986). WARN Act damages, in contrast, are provided by statute, not contract, and are certainly not "earned" by an employee. Hence, the WPCL does not offer an appropriate source for the WARN Act's statute of limitations.

III. THE WARN ACT'S POLICIES AND THE PRACTICALITIES OF LITIGATION FAVOR BORROWING A LIMITATIONS PERIOD FROM THE NLRA

In addition to offering the closest analogy to the WARN Act, the NLRA's limitations period will further the "federal policies at stake" in and effectively deal with the practicalities of WARN Act litigation. Thus, the WARN Act should be governed by the uniform limitations period from its closest analogy—the NLRA.

A. The WARN Act's Structure And Purpose Support Swift Filing Of Claims

As an initial matter, successful enforcement of the WARN Act hinges upon a statute of limitations that encourages prompt litigation. Congress enacted the WARN Act to provide advance notice of imminent dislocation and to afford employees and the government the opportunity to promptly provide assistance. *See* 20 C.F.R. § 639.1(a). Providing funds to workers several years after their termination would undermine congressional intent to provide an immediate cushion of time for employees to explore new job opportunities and, if necessary, seek retraining. *See* 20 C.F.R. § 639.1; *cf. Lloyd v. U.S. Department of Labor*, 637 F.2d 1267, 1270 (9th Cir.

1980) ("[T]o serve the [Trade] Act's purposes of retraining, adjustment, and relocation, it was important that workers claim and receive benefits promptly after discharge.").

By limiting the available remedies for WARN Act violations to a maximum of sixty-days back pay and benefits, 29 U.S.C. § 2104, Congress eliminated any incentive for employees to sue long after the plant closing or mass layoff in order to recover increased compensatory damages. Indeed, Congress's intent to encourage rapid claims resolution is apparent throughout the WARN Act. Congress kept the statute short and simple, stating the notice obligation, the narrow defenses, and the limited remedy in approximately five pages of text. 29 U.S.C. §§ 2101-2109. Congress also provided for simple class resolution by allowing any person to sue "for other persons similarly situated." 29 U.S.C. § 2104(a)(5). The WARN Act contains a broad venue provision which permits suits to be filed in any judicial district in which "the employer transacts business," thereby lowering the barriers to suit. 29 U.S.C. § 2104(a)(5).

In addition, the WARN Act contains an incentive for attorneys to pursue WARN claims by allowing the award of attorney's fees to prevailing parties. 29 U.S.C. § 2104(a)(6). Borrowing multi-year limitations periods would thwart this simple scheme of rapid collective enforcement and liquidated damages.

Moreover, an obvious WARN Act litigation practicality arises from its very subject matter—plant closings and mass layoffs. Laid off or terminated employees disburse over time, and the records of defunct businesses become harder to find. A short statute of limitations would thus enhance the effective litigation of these claims. *See Wilson,* 471 U.S. at 271 ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."); *see also Johnson v. Graphic Communications*

Int'l Union Local 303, 930 F.2d 1178, 1182 (7th Cir. 1991) (NLRA limitations period prevents litigation after records have been destroyed and witnesses have relocated), *cert. denied,* 502 U.S. 862 (1991).

Indeed, Congress added a six-month limitations period to Section 10(b) of the NLRA in 1947, *see* Labor-Management Relations Act, sec. 101, § 10(b), 61 Stat. 136, 146 (1947), to ensure that the NLRB did not issue complaints "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H.R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Relations Act, 1947,* at 292, 331 (1959). The same concerns are presented by WARN Act litigation.

B. Federal Law Favors Rapid Resolution Of Employment Disputes

In addition, the NLRA's six-month limitations period is an appropriate choice, because it furthers the broader federal policy favoring the rapid resolution of employment disputes. *See DelCostello,* 462 U.S. at 171. This policy is particularly important when employees have a union representative. As in this case, unions often have a continuing bargaining relationship with a company, even following a plant closing or mass layoff. Allowing unions to defer WARN Act claims would undermine federal policies favoring stable bargaining relationships and the speedy resolution of labor disputes.

This federal policy is evident not only in the context of traditional labor law, such as Section 10(b) of the NLRA, but also in the series of federal employment laws governing the relationship between employers and their employees. The Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Americans with Disabilities Act ("ADA"), generally require that an individual file a charge of discrimination with the Equal Employment Op-

portunity Commission ("EEOC") within 180 days after the occurrence of the discriminatory event. *See* 29 U.S.C. § 626(d)(1) (180-day filing period under ADEA); 42 U.S.C. § 2000e-5(e)(1) (180-day filing period for Title VII claims); 42 U.S.C. § 12117 (importing enforcement provision of Title VII into the ADA); *see also* 5 U.S.C. § 7118(b) (providing that federal employees must file unfair labor practice charges within six-months).[13]

C. WARN Act Plaintiffs Have Been Able To File Claims Within Six Months

Because of the WARN Act's simplicity, plaintiffs, both represented and unrepresented, have had no difficulty commencing actions under the WARN Act within six

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[13] The statutes of limitations of virtually every state also include limitations periods of six months or less in the employment setting. *See, e.g.*, Arizona Civil Rights Act, Ariz. Rev. Stat. Ann. § 41-1481(A); Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-403; Connecticut Human Rights and Opportunities Law, Conn. Gen. Stat. § 46a-82(e); Georgia Fair Employment Practices Act, Ga. Code Ann. § 45-19-36(b); Illinois Human Rights Act, Ill. Rev. Stat. ch. 775 ¶ 7A-102(A); Iowa Civil Rights Act, Iowa Code § 216.15(12); Kentucky Equal Pay Law, Ky. Rev. Stat. § 337.430; Maine Human Rights Act, Me. Rev. Stat. Ann. tit. 5 § 4611; Maryland Fair Employment Practices Act, Md. Ann. Code Art. 49B § 9A; Missouri Civil Rights Act, Mo. Rev. Stat. § 213.075(1); Nevada Fair Employment Practices Act, Nev. Rev. Stat. § 613.430; New Hampshire Law Against Discrimination, N.H. Rev. Stat. Ann. § 354-A:21(III); New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-18; New Mexico Human Rights Act, N.M. Stat. Ann. § 28-1-10(A); North Carolina Communicable Disease Law, N.C. Gen. Stat. § 130A-148; North Carolina Handicapped Person Protection Act, N.C. Gen. Stat. § 168A-12; Oklahoma Anti-Discrimination Act, Okla. Stat. tit. 25 § 1502(a); Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 959(h); South Carolina Law Against Discrimination, S.C. Code Ann. § 1-13-90(a); Tennessee Anti-Discrimination Law, Tenn. Code Ann. § 4-21-302(c); Texas Employment Discrimination Law, Tex. Lab. Code Ann. § 21.202; Virginia Human Rights Act, Va. Code Ann. § 2.1-719; Washington Family Leave Act, Wash. Rev. Code § 49.78.140(1).

months.[14] Hence, the Third Circuit's fear that a "short statute of limitations could very well frustrate the policies behind WARN" (Pet. App. 14a), was misplaced. Though the Third Circuit expressed concern that the WARN Act lacked an administrative enforcement scheme (Pet. App. 14a), Congress rightly believed that WARN Act claims were simple enough to be resolved directly in the courts without administrative intervention. The WARN Act is short and simple; it provides workers with generous venue provisions, simplified class procedures, and attorney's fees in lieu of an administrative process. 29 U.S.C. §§2101-2109. "Indeed, the absence of a 'complex administrative structure' may be emblematic of the simplicity of a WARN claim." *Halkias*, 31 F.3d at 239 n.35; *see also Carpenters Dist. Council*, 15 F.3d at 1284 n.14 (noting that Congress might have designed the WARN Act to effectuate a "desire for simplicity in the statutory scheme").

Moreover, this Court borrowed the NLRA's six-month statute of limitations in *DelCostello*, notwithstanding the fact that the individual claimant lacked an administrative remedy. 462 U.S. at 172. This Court noted the difficulty

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[14] *See, e.g., Jurcev v. Central Community Hosp.*, 7 F.3d 618 (7th Cir. 1993) (within two weeks), *cert. denied*, 114 S. Ct. 1830 (1994); *Local 217, Hotel & Restaurant Employees Union v. MHM, Inc.*, 976 F.2d 805, 807 (2d Cir. 1992) (within approximately five months of hotel closing); *Salyer v. Universal Concrete Prods.*, 940 F.2d 662 (6th Cir. 1991) *reprinted in full* at 1991 U.S. App. LEXIS 17620 (approximately three months); *Johnson v. Peters Truck Lines*, 8 I.E.R. Cases (BNA) 1036 (N.D. Cal. 1993) (approximately one month); *Moore v. On-Line Software Int'l, Inc.*, 8 I.E.R. Cases (BNA) 1089 (N.D. Ill. 1993) (within six months); *Washington v. Aircap Indus. Corp.*, 8 I.E.R. Cases (BNA) 1426 (D.S.C. 1992) (within six months); *Solberg v. Inline Corp.*, 740 F. Supp. 680 (D. Minn. 1990) (within six months); *Finkler v. Elsinore Shore Associates*, 725 F.Supp. 828 (D.N.J. 1989) (within six months); *Parsley v. Kunja Knitting Mills, USA, Inc.*, 7 I.E.R. Cases (BNA) 225 (D. Mass. 1989) (approximately six weeks); *In re Mr. Goodbuys of New York Corp.*, 164 B.R. 24 (Bankr. E.D.N.Y. 1994) (adversary proceeding brought within five months); *In re Riker Indus., Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993) (proof of claim filed within one month).

faced by an individual claimant in the context of a "hybrid action," but nonetheless endorsed the use of a six-month statute of limitations. *DelCostello*, 462 U.S. at 166; *see also Burnett v. Grattan*, 468 U.S. 42, 61 (1984) (Rehnquist, J., concurring) (noting this Court's willingness to impose a six-month limitations period on an individual claimant).

Many WARN Act plaintiffs are unions accustomed to the rapid filing and resolution of labor disputes. Even unrepresented plaintiffs do not face significant difficulty in filing a WARN Act suit. A plaintiff generally will be aware of a potential WARN violation when he/she loses a job without notice. The plain and simple nature of the statutory violation, together with an attorney's fees provision which encourages the swift involvement of counsel, has allowed plaintiffs to file WARN Act claims promptly.

D. Borrowing State Limitations Periods Would Encourage Forum Shopping, Create Uncertainty And Guarantee Complex And Expensive Collateral Litigation

Because of the WARN Act's broad venue provision, which permits an action to be brought in any district "in which the employer transacts business," 29 U.S.C. § 2104 (a)(5), the use of state limitations periods will "present the danger of forum shopping." *Agency Holding Corp.*, 483 U.S. at 154. This is particularly true because in federal question cases many circuits borrow limitations period from the forum state, regardless of the site of injury.[15]

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[15] *See, e.g., Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 507-08 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980); *Vigman v. Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981); *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328, 333-34 (6th Cir. 1985); *Vanderboom v. Sexton*, 422 F.2d 1233, 1236-37 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977); *see also International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966).

Indeed, in this case, the Union opted to sue Crown in Pennsylavnia for an alleged WARN Act violation which occurred 700 miles away at a Georgia plant. Nonetheless, the Third Circuit noted that a Pennsylvania limitations period would likely apply. (Pet. App. 14a n.4). If WARN Act claims are governed by state limitations periods, potentially tardy plaintiffs will be able to shop for a hospitable forum limitations period and employers, employees and unions will be forced to litigate in otherwise inconvenient jurisdictions.

Moreover, rather then allaying concerns of forum-shopping, unpredictability and uncertainty, choice of law rules guarantee complex and time-consuming litigation over collateral matters. Some circuit courts do not adopt the forum state's statute of limitations but look to the limitations period of the state with the dominant contacts. *See Edelman v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 (1st Cir. 1988); *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982). In those circuits, preliminary and possibly dispositive choice of law issues will guarantee complex and time-consuming litigation over collateral matters, and undermine the WARN Act's uniform character and scope. *See Agency Holding Corp.*, 483 U.S. at 154.

This danger is particularly acute in the WARN Act context, because WARN Act suits can include claims from multiple states. *See, e.g., Halkias*, 31 F.3d at 237 (class action filed in Texas for plant closings in Texas, Oklahoma and Missouri); *OPEIU v. Sea-Land Services Inc.*, 6 I.E.R. Cases (BNA) 1064, 1064 (S.D.N.Y. 1991) (action filed in New York for layoffs in New York and New Jersey).

That employment decisions would have multi-state consequences for WARN Act purposes is no surprise. The interstate nature of the WARN Act is evident on its face. First, the WARN Act recognizes that many manufacturing concerns operate in more than one state. *See* 20 C.F.R. § 639.3(a)(4) ("An example of [common ownership of

multiple sites] would be a major auto maker which has dozens of automobile plants throughout the country."). Second, the WARN Act provides that liability to an individual may hinge on the employer's willingness or ability to "offer[] to transfer the employee to any other site of employment *regardless of the distance.*" 29 U.S.C. § 2101(b)(2)(B) (emphasis added). Third, in determining whether an employer is even covered by the Act, the WARN Act provides for a nationwide count of full-time employees. 29 U.S.C. § 2101(a)(1).

In addition, the Department of Labor, in its comments to the Final Rule, recognized this multi-location effect:

> Commentors raised the question whether notice extends to bumpees who may be bumped at other employment sites . . . . DOL interprets the definition of affected employees to include such workers, who are, therefore entitled to receive notice. . . . It is also possible that an employment action that affects large numbers of workers may trigger a second covered action at a separate site if enough workers lose their jobs through cross-plant bumping.

54 Fed. Reg. at 16047.[16]

Moreover, given the WARN Act's broad venue provision, many employers would be wholly unable to determine beforehand which limitations period would govern a potential WARN Act claim. Hence, state law borrowing would leave defendants unable to " 'calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.' " *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.3). This would undermine the utility of a limitations period.

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[16] Moreover, since WARN covers all types of occupations, some of which transcend state boundaries (*e.g.* sales persons working a territory comprised of multiple states), complex choice of law issues abound.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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No. 94-835

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT

STATEMENT

Respondent United Steelworkers of America, AFL-CIO-CLC ("Union") filed this case on behalf of employees laid off from a manufacturing plant operated by Petitioner Crown Cork & Seal Co., Inc. ("Crown"). The layoffs were carried out without the 60-day prior notice required by the Worker Adjustment and Retraining Notification Act (the "WARN Act" or "WARN"), 29 U.S.C. §§ 2101-09.

The Union filed suit just over one year after the initial layoff of employees. The question before this Court concerns the proper limitations period for filing such a WARN ACT suit.

A. Statutory Framework

The WARN Act generally requires that, before initiating a mass layoff or plant closing, an employer must provide 60 days notice to affected employees (or their union representative if they have one), and to officials of the local community in which the layoffs will occur. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1.[1]

A statutory mass layoff or plant closing occurs when a specified requisite minimum number and/or percentage of employees suffer an "employment loss" within a 30-day period or, in some circumstances, within a 90-day period. 29 U.S.C. §§ 2102(a)(2), (3), and 2102(d). The Act defines an "employment loss" as a layoff lasting more than six months, a termination, or a reduction in work hours of more than 50% for each month of any six-month period. *Id.* § 2101(a)(6).

In specified circumstances, such as where the layoff or plant closing results from unforseeable business circumstances or a natural disaster, or where there is a showing that the employer was seeking capital or business to avoid the closing or layoff, the employer may dispense with, or reduce the period of, the notice that otherwise would be required by the Act. *Id.* § 2102 (b)(1)-(3).

An employer who violates the Act's 60-day notice requirement is liable to aggrieved employees for payments in amounts specified in the Act, which are based upon each employee's daily wage rate, with the aggregate payment not to exceed 60 days of wages, plus benefits and medical expenses. *Id.* § 2104(a)(1). An employer

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[1] The Act defines an "employer" as a business enterprise employing "100 or more employees, excluding part-time employees" or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." *Id.* § 2101 (a)(1)(A) & (B).

violating the Act also is liable to local authorities, who may collect $500 for each day of violation. *Id.* § 2104(a)(3).

Other than the specified monetary amounts, the only relief available in a WARN suit is attorney's fees and costs. *Id.* § 2104(a)(6). The statute states that "[t]he remedies provided for in [§ 2104] shall be the exclusive remedies for any violation of this chapter." *Id.* § 2104(b). WARN does not provide for any injunctive or other equitable relief; on the contrary, the Act expressly prohibits courts from applying the Act to enjoin a plant closing or layoff. *Id.*

WARN Act liability is enforced by filing an action in federal court. Aggrieved employees or their union may file an action, as may a unit of local government. *Id.* § 2104(a)(5).

B. Facts and Proceedings Below

On or about September 30, 1991, Crown ordered a "temporary shutdown" entailing the layoff of approximately 85 Union-represented employees at its Perry, Georgia manufacturing plant. Joint Appendix ("J.A.") 9-10. The layoffs continued for over six months and resulted in an "employment loss' such as to render applicable the WARN requirement of 60 days advance notice. J.A. 10.[2] However, Crown did not provide that notice. *Id.*

On October 15, 1992, the Union filed this action in the United States District Court for the Eastern District of Pennsylvania, where Crown's headquarters is located. J.A. 9. The Union's complaint sought 60 days of wages and benefits for each affected employee. The complaint did not seek any injunctive relief. J.A. 10-11.

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[2] In 1992 the layoffs became permanent when the permanent closing of the plant was announced.

On March 5, 1993, Crown moved for summary judgment. J.A. 15. Crown's motion was based solely on the contention that the Union's claim was time-barred. In support of its defense, Crown contended that WARN Act claims must be filed within the six-month limitations period set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

The District Court denied Crown's motion for summary judgment in a Memorandum and Order dated August 24, 1993. Appendix to Petition for Certiorari ("Pet. App.") 17a-23a. The District Court rejected Crown's contention that NLRA § 10(b) provides the appropriate limitations statute for WARN claims and "conclude[d] that Pennsylvania law provides the appropriate limitations period for civil suits under the WARN Act." Pet. App. 22a. As "[n]either party cite[d] a possible analogous state statute that is shorter than two years," and "plaintiff filed its complaint less than two years [after] defendant's alleged termination of employees at its Perry plant," the court ruled that it did "not have to determine the particular Pennsylvania statute from which to borrow." Pet. App. 22a.

By order dated September 16, 1993, the District Court granted Crown's Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C § 1292(b). Pet. App. 24a. The Court of Appeals for the Third Circuit granted Crown permission to appeal. A unanimous panel of that court affirmed the district court's decision. Pet. App. 2a-16a.

This Court granted certiorari, and consolidated the case with No. 94-834, *North Star Steel Co. v. Thomas*.[3]

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[3] We will refer to the petitioner in the present case as "Crown," and to the petitioner in No. 94-834 as "North Star." We will refer to their briefs as "Crown Br." and "North Star Br.," respectively.

SUMMARY OF ARGUMENT

I.

A. For more than 160 years, this Court has followed a practice of adopting state statutes of limitations when a federal statute does not contain an express limitations period. By now, "[t]he practice has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'" *Lampf v. Gilbertson*, 501 U.S. 350, 355 (1991) (plurality opinion), quoting *Agency Holding Corp. v. Malley-Duff Assocs.*, 483 U.S. 143, 147 (1987).

The only exception to the rule is "narrow" and "closely circumscribed": a state limitations period will not be borrowed if to do so would *frustrate the policies of the federal enactment.* That this exception is confined to extraordinary situations is manifested in the fact that there is but a single case in which this Court has borrowed for an express federal statutory claim a limitations period contained in a different federal statute.

B. On no acount should the WARN Act become the second member of that set of one. WARN creates a simple damage action against employers who breach a single duty. On its face, this plain-vanilla remedial scheme is the least likely of candidates to require deviation from the usual rule governing selection of limitations periods.

Petitioners fail to show that applying state limitations periods to WARN suits would frustrate federal policy in any way. Although petitioners argue that there is a broad policy favoring the rapid resolution of employment disputes which compels resort to the six month limitations period in § 10(b) of the National Labor Relations Act, this Court has squarely rejected such a theory, holding that § 10(b) is relevant only to claims that "directly challenge both the employer's adherence to [a] collective-bargaining agreement and the union's representation of

the employee in grievance-and-arbitration procedures." *Reed v. United Transportation Union*, 488 U.S. 319, 331 (1989). WARN suits do not involve any such claims.

Nor would the availability of state statutes of limitations for WARN suits present a potential for forum shopping or complexities of litigation beyond what is routinely presented by the countless other federal statutes to which state limitations periods are applied. Indeed, those concerns should arise in WARN litigation to a *lesser* degree than under most such statutes.

C. Failing to establish that state limitations periods would frustrate any federal policy, petitioners argue that NLRA § 10(b) should be adopted as the statute of limitations for WARN suits merely because the NLRA provides a "closer analogy" to WARN than do state causes of action. But this Court's precedents do not permit the state limitations borrowing rule to be pushed aside merely because some federal statute is considered to provide a "closer analogy." And, in any event, the NLRA is not closely analogous to WARN. The NLRA deals with the *process of bargaining*; WARN sets a *minimum substantive standard* and does not mandate or regulate bargaining in any way. WARN and the NLRA thus fall into what this Court has recognized as two discrete categories of labor legislation that are different at the most fundamental level. What is more, the remedies available under WARN bear not the slightest resemblance to the remedies available under the NLRA.

II.

Indeed, WARN is so dissimilar to the NLRA that, if it were proper to borrow a federal statute of limitations for WARN suits, the two-year limitation period for claims under the Fair Labor Standards Act and other federal wage laws would be a more appropriate choice than NLRA § 10(b). Those statutes, like WARN, provide for an action for backpay based on an employee's wage rate. And, a two-year limitation is much more in

the mainstream of federal limitations periods, for labor cases and others, than the unusually short six month limitation of § 10(b), which is designed for special circumstances that simply are not presented by WARN suits.

ARGUMENT

I. THERE IS NO BASIS IN THIS CASE TO DEPART FROM THE LONGSTANDING RULE REQUIRING ADOPTION OF STATE LIMITATION PERIODS FOR EXPRESS FEDERAL STATUTORY CLAIMS AS TO WHICH NO EXPRESS STATUTE OF LIMITATIONS APPLIES

A.

Congress was silent as to the statute of limitations to be applied to claims under the WARN Act. The rule to be followed in this circumstance has long been settled:

> As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise. *McCluny v. Silliman*, 3 Pet. 270, 277. In 1895, the question was re-examined in another context, but the conclusion remained firm. *Campbell v. Haverhill*, 155 U.S. 610. Since that time, state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question. [*Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 704 (1966).]

When first announced, the borrowing rule rested on the theory that state statutes of limitations are "the law of the forum and operat[e] upon all who submit themselves to its jurisdiction," including those who sue in federal court on a federally-created right. *McCluny v. Silliman*, 3 Pet. 270, 276-277 (1830). On that understanding, the Rules of Decision Act required that state statutes of limitations be followed by the courts in all such cases.

By the middle of this century, this Court had come to view "[t]he implied absorption of State statutes of limi-

tation within the interstices of the federal enactments" not as an inexorable command of the Rules of Decision Act, but as "a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946).

But this recasting of the doctrinal foundation for the state limitations borrowing rule did not affect the basic rule itself; Justice Frankfurter, speaking for the Court in *Holmberg*, reiterated that "[a]s to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." 327 U.S. at 395.

This longstanding rule is firmly settled as the background predicate for Congress' legislative actions. *See Agency Holding Corp. v. Malley-Duff Assocs.*, 483 U.S. 143, 147 (1987). As the Court stated in its most recent decision in this area, "[t]he practice [of borrowing state limitations periods] has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'" *Lampf v. Gilbertson*, 501 U.S. 350, 355 (1991) (plurality opinion), *quoting Agency Holding Corp.*, 483 U.S. at 147.[4] *See also Agency Holding Corp.*, at 164-165 (Scalia, J., concurring in judgment) ("after a century and a half of the Court's reacting to congressional silence by applying state statutes . . . by now at least it *is* reasonable to say that such a result is what Congress must expect, and hence intend, by its silence"); *Reed v. United*

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[4] *See also Lampf*, 501 U.S. at 368 (Stevens, J., dissenting) (supporting "the traditional rule of applying a state limitations period when the federal statute is silent"); *id.* at 374 (Kennedy, J., dissenting) ("in the absence of an express limitations period in a federal statute, courts as a general matter should apply the most analogous state limitations period, or in rare cases, no limitations period at all").

Transportation Union, 488 U.S. 319, 323-324 (1989); *DelCostello v. Teamsters*, 462 U.S. 151, 158 (1983).[5]

To be sure, the state law borrowing rule is not absolute. Rather, it is subject to what this Court has variously described as a "limited," *Agency Holding Corp.*, 483 U.S. at 147, "closely circumscribed," *Lampf*, 501 U.S. at 356, "unusual," and "narrow exception to the general rule that statutes of limitation are borrowed from state law," *Reed*, 488 U.S. at 324.

In *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977), the Court offered the first full articulation of the nature and extent of that exception. The essential point, said the *Occidental Life* Court, is that "state limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Id.* at 367. Most recently, the Court put the point this way: "when the operation of a state limitations period would frustrate the policies embraced by the federal enactment, this Court has looked to federal law for a suitable period." *Lampf*, 501 U.S. at 355-356 (plurality opinion). *See also Reed*, 488 U.S. at 327.

So understood, the exception follows logically from the general rule. While the borrowing rule is so firmly

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[5] Cases in which the Court has applied this rule to hold that claims under a federal statute are subject to state statutes of limitations include, among others, *Reed* (Title I of the Labor-Management Reporting and Disclosure Act); *Hoosier Corp.* (§ 301 of the Labor Management Relations Act); *Owens v. Okure*, 488 U.S. 235 (1989) (42 U.S.C. § 1983); *Wilson v. Garcia*, 471 U.S. 261 (1985) (same); *Goodman v. Lukens Steel*, 482 U.S. 656 (1987) (42 U.S.C. § 1981; employment); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (same); *Runyon v. McCrary*, 427 U.S. 160, 180-182 (1976) (§ 1981; admission to private school); *Cope v. Anderson*, 331 U.S. 461 (1947) (National Bank Act); *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1871); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906) (Sherman Act); *Brady v. Daly*, 175 U.S. 148, 158 (1899) (copyright infringement); *Campbell v. Haverhill*, 155 U.S. 610, 614-617 (1895) (Patent Act).

established that "we can generally assume that Congress intends by its silence that we borrow state law," *Agency Holding Corp.*, 483 U.S. at 147, that assumption makes no sense if the otherwise applicable state law rule would frustrate federal policies. Rather, in that circumstance it is "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *Id., quoting DelCostello*, 462 U.S. at 161.

The Court's cases applying this "narrow exception" illustrate its "circumscribed" limits. Only rarely has the Court borrowed a federal limitations period and applied it to a statutory cause of action which lacked its own statute of limitations; in each case the legal context was most assuredly "unusual." *Reed*, 408 U.S. at 324.

In *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), the Court applied a federal statute of limitations to a *federal common law* cause of action which necessarily was joined with a federal statutory claim containing an express statute of limitations. Because the cause of action at issue in *McAllister* arose under the federal common law, there was no basis for assuming a congressional intent to follow the usual rule of state borrowing. Moreover, because that common law claim was necessarily joined with a statutory claim, the application of a shorter state limitation to the federal common law claim would "effect in substance a similar limitation" on the statutory claim, thereby nullifying the longer limitation adopted by Congress for the statutory claim and depriving the plaintiff of "the full benefit of federal law." *Id.* at 325, 326. For those reasons, the Court applied the limitations period Congress had enacted for the statutory claim to the common law claim as well.

DelCostello v. Teamsters and *Lampf v. Gilbertson* are quite similar. Those cases involved federal causes of action that were *judicially implied* from a federal statute. In each of those cases, moreover, the statute which gave rise to the implied cause of action also stated express

causes of action with express limitations periods quite different from the state limitations periods that otherwise would have been borrowed. That being so, the Court soundly reasoned that the basis for applying the state law borrowing rule was attenuated at best, because the causes of action in question were ones Congress "really never knew existed." *Lampf*, 501 U.S. at 359. The Court reasoned, too, that the surest way to effectuate congressional intent where "the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation" is to "look first to the statute of origin." *Id.* The *Lampf* Court stated:

> We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections. *See DelCostello*, 462 U.S. at 171. When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end. [501 U.S. at 359.] [6]

There is thus but a *single* case in which this Court has departed from the "usual rule" and has borrowed for a federal *statutory* claim a limitations period contained in *a different federal statute*.[7] That case, *Agency Holding*

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[6] *Holmberg v. Armbrecht*, *supra*, also involved an implied cause of action, but one for which the sole remedy was in equity. In that context the Court applied the doctrine of laches, rather than any statute of limitations, reasoning that Congress "can hardly expect" the courts "to break with historical principles of equity in the enforcement of federally-created equitable rights." 327 U.S. at 395.

In *West v. Conrail*, 481 U.S. 35 (1987), a statute of limitations contained in the National Labor Relations Act was applied to a cause of action implied under the Railway Labor Act, but the parties had agreed as to the applicable statute of limitations and the Court did not address the matter. *See id.* at 38 n.2.

[7] In *Occidental Life*, *supra*, the Court concluded that application of any statute of limitations, state or federal, to claims brought by the EEOC under Title VII of the Civil Rights Act of 1964 would be contrary to the policies underlying that statute, because the EEOC is statutorily required, before bringing suit,

Corp. v. Malley-Duff & Assocs., supra, involved a federal statute which, as the Court itself stated, 483 U.S. at 153, is *"sui generis:"* the Racketeer Influenced and Corrupt Organizations Act (RICO).

As the Court noted in *Agency Holding Corp.*, "the heart of any RICO complaint is the allegation of a pattern of racketeering." 483 U.S. at 154. The "predicate acts that may establish racketeering activity under RICO are far ranging"; those acts "cannot be reduced to a single generic characterization" and "will often occur in several states." *Id.* at 152, 154. The RICO cause of action, moreover, rests on "[c]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' [which] were simply unknown to common law." *Id.* at 150.

Rather, the RICO cause of action was based upon "an antitrust model." *Id.* at 151. The RICO civil enforcement provision was taken virtually verbatim from the civil enforcement provision of the Clayton Act, 15 U.S.C. § 15 (a), which, like RICO, provides for treble damages to a person "injured in his business or property." And the " 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.' " 483 U.S. at 151, *quoting Sedima S.P.R.L. v. Imrex Co.,* 437 U.S. 479, 489 (1985). In these unique circumstances the Court determined that the Clayton Act statute of limitations should be applied to RICO claims.

Fairly read, then, *Agency Holding Corp.* confirms that, as the Court subsequently has put it, "the 'state borrowing doctrine' may not be lightly abandoned," *Lampf,* 501 U.S. at 356, and a "compelling demonstration" is required to justify a deviation from this doctrine, *Reed,* 488 U.S. at 327.

B.

Petitioners thus begin with a heavy burden in their attempt to push aside state law here and make this case

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to engage in an indeterminate period of investigation and conciliation.

the second in a set of one in which this Court has borrowed for an express federal statutory claim a limitations period contained in a different federal statute. That burden is doubly heavy given that the WARN Act—unlike RICO—creates nothing more than a simple damage action against employers who breach a single duty, *viz.*, the duty to give 60 days advance notice prior to a plant closing or mass layoff. On its face, this plain-vanilla remedial scheme is the least likely of candidates for ignoring state law.[8]

Petitioners advance two arguments in an effort to show that the application of state limitations statutes would "frustrate the policies embraced by the federal enactment." *Lampf*, 501 U.S. at 356. Neither argument withstands analysis.

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[8] Pennsylvania provides three specific limitations periods, ranging from two to four years, that appropriately could be applied to a WARN claim: the four-year limitation for actions on a contract either implied in law or based on an agreement not in writing, 42 Pa. Cons. Stat. Ann. § 5525(3) or (4); the three-year limitation for suits under the Pennsylvania Wage Payment and Collection Law to recoup "unpaid wages or liquidated damages," 42 Pa. Stat. Ann. § 260.9a(g); or the two-year limitation for enforcing civil penalties, 42 Pa. Cons. Stat. Ann. § 5524(5). Alternatively, Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527, could be applied. *See Owens v. Okure*, 488 U.S. 235, 246-247 (1989) (in a § 1983 case, court could apply "a residual provision which applies to all actions not specifically provided for"). *But cf. Agency Holding Corp.*, 483 U.S. at 153.

All of those limitations periods apply to claims for money damages such as are presented in a WARN Act suit. To be sure, as petitioners argue at length, Pennsylvania does not have a plant-closing-notice law like WARN—although it is hardly unkown under state law for a party to be monetarily liable for acting without proper notice. "[T]he mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations." *Agency Holding Corp.*, 483 U.S. at 147. *See also DelCostello*, 462 U.S. at 171. Indeed, "any analogies to [state] causes of action are bound to be imperfect," *Wilson v. Garcia*, 471 U.S. 261, 271 (1985), and "the adoption of one analogy rather than another will often be somewhat arbitrary," *id.* n.24.

1. Petitioners first contend that application of a state limitations period would frustrate a supposed federal policy favoring "rapid" or "speedy" resolution of "employment disputes." Crown Br. 27-28; North Star Br. 27-32. Significantly, petitioners point to nothing in the WARN Act itself stating such a policy. Indeed, the fact that the Act expressly forecloses any form of injunctive relief—including temporary restraining orders and preliminary injunctions—suggests that rapid resolution of legal disputes is *not* a priority under this law.[9]

Rather than finding some conflict between state statutes of limitations and the "policies embraced by the federal enactment" at issue—the WARN Act—petitioners rely on *other* federal enactments to establish this supposed federal policy governing "employment disputes" generally. Needless to say, petitioners are quite selective in the statutes they choose to cite. For example, petitioners completely bypass such federal employment laws as the Fair Labor Standards Act, the Davis-Bacon Act, the Equal Pay Act, the Walsh-Healy Act, the Employee Retirement Income

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[9] It is, of course, true, as petitioners note, that the point of the law is to assure employees of timely advance notice of closings and mass layoffs in order "to provide an immediate cushion of time for employees to explore new job opportunities and, if necessary, seek retraining." Crown Br. 25. But the statute of limitations issue arises only where employees sue for backpay because they have *not* received that "immediate cushion." Such a lawsuit cannot and does not seek a "cushion of time;" the suit seeks backpay, and petitioners point to nothing in the Act to suggest that it was Congress' judgment that, where an employer has failed to provide the required notice, backpay must be sought quickly or not at all.

To the contrary, the backpay provided under the WARN Act is "in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings." S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987). *See also id.* at 2 (characterizing all WARN monetary payments as "penalties"); H.R. Rep. No. 285, 100th Cong., 1st Sess. 4 (1987) (same). Those statutory purposes would hardly be served by holding that an employer escapes liability whenever employees do not bring suit within six months.

Security Act (ERISA), the Federal Employers' Liability Act, the Employee Polygraph Protection Act, and the Family and Medical Leave Act. Notwithstanding petitioners' silence in these regards, it is surely significant that *all of these eight federal employment laws provide express limitations periods of from two to six years for civil actions.*[10] That, we submit, completely refutes petitioners' overbroad argument.

This is not to deny that there is a federal policy favoring the rapid resolution of *certain* types of employment—or, more precisely, labor—disputes. Specifically, § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides a six-months limitations period for claims arising under that Act. This Court has correctly understood that statute of limitations to embody a policy favoring speed with respect those disputes which

> implicate[] "those consensual processes that federal law is chiefly designed to promote—the formation of the [collective bargaining] agreement and the private settlement of disputes under it." [*DelCostello*, 462 U.S. at 171, *quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring in judgment), in turn *quoting Hoosier Corp.*, 383 U.S. at 702.]

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[10] *See* 29 U.S.C. § 255 (two year limitation for suits under Fair Labor Standards Act (including the Equal Pay Act), Davis-Bacon Act and Walsh-Healy Act); 29 U.S.C. § 1113 (six year limitation on certain ERISA actions); 45 U.S.C. § 56 (three year limitation on suits under Federal Employers' Liability Act); 29 U.S.C. § 2005(c)(2) (three year limitation on suits under Employee Polygraph Protection Act); 29 U.S.C. § 2617(c)(1)-(2) (two year limitation on suits under Family and Medical Leave Act).

In contrast, the anti-discrimination laws which are enforced through the Equal Employment Opportunity Commission require that *administrative charges* be filed within a relatively short time after those claims arise. 42 U.S.C. § 2000e-5(e). *See also* Crown Br. 28 n.13 (cataloging six-month limitation periods in state statutes, virtually all of which pertain to the filing of administrative charges of discrimination). Petitioners make no argument that the policy underlying that requirement is in any sense implicated by WARN Act lawsuits.

The implied cause of action at issue in *DelCostello*, through which the plaintiff sought to overturn a grievance-arbitration award, directly implicated those processes. For that reason—and because the cause of action was implied from the same law, the NLRA, which established the six-month limitations period for express claims, *see* pp. 10-11 *supra*—the Court applied § 10(b) in *DelCostello*.[11]

That *DelCostello* does not, as petitioners seem to believe, state a more general policy favoring the rapid resolution of all "employment disputes" is clear from this Court's subsequent decision in *Reed*. That case involved a claim under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(2), in which a union member alleged that the union had violated his right to free speech concerning union matters. This Court, after acknowledging that such a case might have an impact on a "union's activities and effectiveness in the collective bargaining arena," 488 U.S. at 330-331, nonetheless upheld the applicability of a state statute of limitations rather than NLRA § 10(b). The *Reed* Court explained that result as follows:

> These observations . . . are not enough to persuade us that federal policy requires that § 10(b) govern claims under § 101(a)(2) of the LMRDA, for they establish no more than that § 101(a)(2) actions may sometimes have "some impact on economic relations between union and employer and on labor

[11] *DelCostello* involved a "hybrid suit" consisting of a claim that the union had breached its NLRA duty of fair representation in processing a grievance under a collective bargaining agreement, coupled with an "inextricably interdependent" claim against an employer, brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of the collective agreement. 462 U.S. at 164-165, *quoting Mitchell*, 451 U.S. at 66-67 (Stewart, J., concurring in judgment). Had the plaintiff prevailed on the fair representation claim, the result would effectively have been to set aside the resolution of the grievance reached through the grievance procedure and to reopen the plaintiff's claim as to the meaning of the collectively-bargained agreement.

> peace." Brief for Respondents 22. *This is substantially less immediate and less significant an impact on bargaining and private dispute settlement than that which led us to apply the § 10(b) statute to hybrid § 301/fair representation claims, which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures.* [488 U.S. at 331 (emphasis added).]

If, as the Court held in *Reed*, the relief sought in an LMRDA § 101(a)(2) case does not have a sufficiently direct impact on the negotiation and enforcement of a collective bargaining agreement to justify application of the six-month limitation contained in NLRA § 10(b), it is obvious that a WARN Act claim, in whch the only relief available is a sum of money, does not call for the application of § 10(b). Pursuit of that claim for money is unlikely to have *any* impact—let alone a direct impact —on the negotiation or enforcement of a collective bargaining agreement.[12]

2. Crown alternatively argues that state law should be discarded here because its application would create certain complications in WARN litigation. Specifically, Crown expresses the concern that, because a WARN suit may be brought in any district "in which the employer transacts business," 29 U.S.C. § 2104(a)(5), and because some employers transact business in several

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[12] Petitioners make the mistake of assuming that, because the *notice* required by WARN may have some impact on bargaining, a WARN *lawsuit* also must have such an impact. That assumption is triply flawed. In the first place, petitioners' argument has no application, even on its own terms, to unrepresented workers or to public agencies. In the second place, although, in a unionized workplace, a WARN notice may in some cases cause the union to request bargaining, the statute does not *require* bargaining, nor does it directly affect the bargaining process. *See infra* at 24-25 and n.16. Thirdly, even putting those points aside, a WARN *lawsuit* does not even result in a *notice*, much less in any other relief that might have an impact on bargaining.

jurisdictions, employees might engage in forum shopping if the applicable statute of limitations were to vary from state to state. Crown also argues that the availability of a number of possible limitations statutes will give rise to complex litigation. Crown Br. 30-32. *See also* North Star Br. 13-17. Those concerns are overstated and do not justify abandoning resort to state limitation statutes in WARN cases.

It is not at all unusual for a plaintiff to be able to bring a federal claim in any district in which the employer transacts business. Indeed, the general federal venue provision permits this in most cases where a statute does not provide otherwise. *See* 28 U.S.C. § 1391(b),(c). The settled rule requiring application of state statutes of limitation could never have become established if an exception were to be made whenever a defendant is subject to suit in several states.

Hoosier Corp., supra, is instructive in this regard. There the Court declined to adopt a uniform limitations period for claims under § 301 of the Labor Management Relations Act—which may be brought "in any district court of the United States having jurisdiction of the parties," 29 U.S.C. § 185(a)—despite the Court's recognition that "the subject matter of § 301 is 'peculiarly one that calls for uniform law.' " *Hoosier Corp.,* 383 U.S. at 701, *quoting Teamsters Local v. Lucas Flour Co.,* 369 U.S. 95, 103 (1962). The Court stated that, "although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us." 383 U.S. at 702-703.

To be sure, in *Agency Holding Corp.,* the Court stated that, in litigation under RICO, "[w]ith the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward

matter.' " 483 U.S. at 154. But the Court's analysis was directed at the unique features of RICO, under which so many different kinds of predicate acts committed in different jurisdictions may form the basis of liability that there necessarily would be a debate in every case as to the choice of law and the proper characterization of the particular claims asserted. *See supra* at 12.

That problem does not exist with respect to the WARN Act, which allows only one kind of claim and which most commonly involves a dispute wholly within one State. Thus, the potential for forum shopping and uncertainty was much greater in *Agency Holding Corp.* than here. Any such potential is easily dealt with here in the established way of so doing: the adoption of a uniform "generic characterization" of the single WARN Act cause of action with the result that claims thereunder are subject to a *single type* of *state* limitations statute. *See Reed,* 488 U.S. at 325; *Wilson v. Garcia,* 471 U.S. at 268; *Owens v. Okure, supra.*[13]

When all is said and done, the application of state statutes of limitations to WARN suits does not give rise to any greater potential for forum shopping or complexities of litigation than is the case with any other federal statute to which state limitations have been applied. Indeed, in at least two respects, WARN presents such problems to a much lesser degree than other statutes. First, as we have noted, WARN suits all involve only one simple kind of claim, rather than the multiplicity of claims that may be asserted under other statutes not containing an

[13] Similarly, if, as Crown maintains, there is confusion as to whether a federal court should apply the limitations period of the forum state or of the state where the violation occurred, *see* Crown Br. 30-31, that question (like the question whether to apply one type of state statute of limitations or more than one type) is a matter that the Court could resolve in a uniform way in an appropriate case presenting the question. The mere fact that such issues may need to be resolved is in no way peculiar to the WARN Act context.

express limitation period. Second, the backpay available to employees under WARN does not exceed sixty days of wages no matter when suit is brought; consequently, unlike the situation under most statutes, a WARN plaintiff cannot engage in forum shopping to find a statute of limitations that will enable hm to secure a greater potential backpay award. Indeed, as the instant case illustrates, most often WARN lawsuits will be filed within the time limits of any applicable state limitations period, thereby pretermitting the need to resolve any of the questions about which petitioners fret.

In sum, if state law can be discarded as the source of law for limiting this elementary cause of action, it can be discarded in any case.

C.

Recognizing the futility of their attempt to show that application of a state limitations periods here would be "inconsistent with" or "frustrate" federal policy, petitioners attempt to remake the governing rule more to their liking. Thus, Crown states that although "[o]n occasion" this Court has looked to state limitations periods as a " 'fallback rule of thumb,' " the Court "has often borrowed a limitations period for a federal cause of action from elsewhere in federal law" and, according to Crown, it is 'questionable how weighty the 'fallback' presumption of state law borrowing should be." Crown Br. at 8-9. Crown proceeds to answer that "question" as follows: "Courts should borrow a limitations period from the best analogy, *be it state or federal*, so long as the limitations period is consistent with federal policies and litigation practicalities." *Crown* Br. 10 (emphasis added). And both Crown and North Star devote the lion's share of their briefs to arguing that "the NLRA offers a closer analogy" or "closer fit" to the WARN Act than any state law alternative. North Star Br. 11-25; Crown Br. 18-27.

1. Petitioners' argument suffers from the same defect as the Ptolemaic theory. Just as the ancient astronomers started from the premise that the earth is the center of

the universe and the sun is at the periphery, so petitioners start from the premise that the "narrow exception" to the state law borrowing rule is the center of this Court's statute of limitations jurisprudence and that the "general rule" of state law borrowing is at the periphery. Indeed, at bottom, petitioners deny *any* preference for state limitations periods; in their view, the inquiry presumes that analogous state limitations periods and federal limitations periods are equal sources in the borrowing context.

This Court has never so held. Rather, what this Court has said—not just "occasionally" but repeatedly for over 160 years—is that there is a strong presumption favoring state law, to be overcome only on a "compelling demonstration." *See supra* at 7-12.

Petitioners base their contrary argument on the following words from *DelCostello, supra,* which are quoted in several subsequent decisions:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law. [462 U.S. at 171-72.]

By its own terms, this statement is far more limited than petitioners acknowledge since it requires not only a "*clearly* . . . closer analogy" but also a determination that "the federal policies at stake and the practicalities of litigation make [the federal] rule . . . *significantly* more appropriate." Moreover, *DelCostello* also explicitly states that "resort to state law remains the norm," to be overcome only where the state rules are *"at odds with the purposes or operation of federal substantive law." Id.* at 171, 161 (emphasis added). And, as we have seen, on its facts *DelCostello* involved an extraordinary situa-

tion in which the federal law which gave rise to the implied cause of action contained an express statute of limitations for express claims indistinguishable in all relevant respects from the implied claims.

That *DelCostello* did not announce a rule obliterating the state law preference in favor of a practice which looks equally to state and federal law for the "closest analogy" was made explicit by the Court's decision six years later in *Reed*. The *Reed* Court described *DelCostello* as "a closely circumscribed exception to the general rule that statutes of limitation are to be borrowed from state law," 488 U.S. at 324, and rejected arguments such as petitioners advance here on the ground that those arguments "fail[] to take seriously our admonition that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies," *id.* at 327.[14]

In sum, the relevant question here is not the degree of "fit" of state and federal analogies but rather whether

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[14] North Star suggests that the Court "may wish to revisit the wisdom of its current borrowing doctrine," and "[i]n its place . . . adopt a borrowing doctrine in which federal law is used almost exclusively to determine federal limitations periods." North Star Br. 32. In truth, only with such a drastic reinvention of the law could petitioners win this case. But, as we have shown, the state limitations borrowing rule is an established principle under which Congress expects its enactments to be enforced. *See supra* at 8. To change that rule after the enactment of the statute would be to depart from what must be presumed to have been the intent of the Congress that enacted WARN. It should be noted in this connection that in 1990, Congress adopted a new four-year residual statute of limitations for federal statutes that do not provide for a specific limitations period. *See* 28 U.S.C. § 1658, as amended by Pub. L. 101-650, Title III, § 314(a), 104 Stat. 5114 (Dec. 1, 1990). That provision will end state limitations borrowing, but *only* as to statutes "enacted *after* the date of the enactment of this section." *Id.* (emphasis added). The Court should decline petitioners' invitation to change the law as to statutes, such as WARN, that were enacted *prior* to that date. *Cf. Patsy v. Florida Board of Regents*, 457 U.S. 496, 512 (1982).

application of state limitations statutes would frustrate federal policies. As we already have seen, application of a state limitations period here would do nothing of the kind.

2. Even if, contrary to what we have just shown, petitioners were correct in focusing on the "closest analogy," petitioners still would be wrong on the result in this case. For NLRA § 10(b) does not, in fact, fit the circumstances of the WARN Act.

The most petitioners can fairly say is that WARN explicitly requires notice to unions, unrepresented workers, and local government officials in advance of certain closings and layoffs, while the duty to bargain in good faith under the NLRA has been construed (quite correctly) to give rise to an obligation to provide notice to a union—although certainly not to unrepresented employees or to public agencies—in some such situations. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981).

Any resemblance between the WARN Act and the NLRA ends at that superficial level.

a) WARN and the NLRA are, respectively, exemplars of what this Court has recognized to be two *fundamentally distinct* categories of labor legislation. One category, of which the NLRA is the prime example, concerns itself "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck. . . ." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985). The other category consists of laws that do not regulate the bargaining process itself, but instead set "minimum terms of employment," *id.* at 754, *i.e.*, "minimum substantive requirements" designed to "give specific minimum protections to individual workers, *id.* at 754-755. The Court has explained that enactments of the latter type—which create "rights, and obligations independent of a labor contract," *Allis Chalmers*

v. Lueck, 471 U.S. 203, 212 (1985)—simply do not occupy the same field as the NLRA. *Metropolitan Life*, 471 U.S. at 751-758.

WARN is decidedly in this second category of labor legislation. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court held that a state law requiring employers to provide a severance payment to employees in the event of a plant closing establishes a "minimum substantive labor standard" which does not "directly regulate[]" the process of collective bargaining or the use of economic weapons, *id.* at 20, and therefore does not fall within the field covered by the NLRA. The same is true of the WARN Act.

The WARN statute does *not* establish or regulate any duty in an employer to bargain or consult with anyone—unions, unrepresented employees, or local governments. Indeed, as Crown acknowledges, the initial formulation of the WARN legislation contained a consultation requirement, but the provision was deleted from the bill before enactment.[15]

WARN simply establishes one minimum substantive standard: an employer who has decided to conduct a closing or a mass layoff cannot keep his intentions in the dark but must provide 60 days notice to employees,

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[15] A provision that would have required employers to disclose certain information also was deleted. *See* House Committee on Education and Labor, Subcomm. on Labor-Management Relations, 101st Cong., 2d Sess., Legislative History of the Worker Adjustment and Retraining Notification Act (Comm. Print 1990) at 683 (statement of Senator Metzenbaum) (as a result of eliminating the consultation and information provisions, "[t]he bill now is a simple and straightforward notice law"). *See also id.* at 286 (statement of Senator Metzenbaum) ("[N]o one associated with this bill ever intended it to affect the balance of rights under the National Labor Relations Act. This bill is absolutely neutral with respect to labor law."). Inexplicably, Crown purports to discover the meaning of the WARN Act by citing statements in the legislative history describing the proposed legislation as it existed *before those critical deletions*. *See* Crown Br. 16-18 and n.10.

unions and public agencies. As with the severance pay required by the statute in *Fort Halifax Packing Co.*, the purpose of the notice required by WARN is to soften the blow of such employment losses; the notice is intended to enable affected employees to arrange their finances and begin their search for other employment, and to enable local governments to provide timely job counseling and training services. *See* S. Rep. No. 62, 100th Cong., 1st Sess. 5, 9-12 (1987); 20 C.F.R. § 639.1(a).

Thus, WARN falls squarely within the class of labor legislation that deals with substantive standards, rather than the class that deals with the process of collective bargaining that is the subject of the NLRA.[16]

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[16] To describe the NLRA as "designed to afford protection against job loss," North Star Br. 23, quoting *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850, 856 (6th Cir. 1994), is to misconceive the statute in the most fundamental respect. "[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved." *First National Maintenance*, 452 U.S. at 680-681.

Although, as a practical matter, the providing of notice under WARN may in some cases lead to the initiation of bargaining (although only where a workplace is organized), it remains the case that WARN does not itself require or regulate bargaining. Any surface similarity between WARN and the NLRA in this one regard has no bearing on the choice of a limitations period. As the Court said in *Reed* of the relationship between Title I of the LMRDA and the NLRA, any "overlap" between the two statutes "would not be attributable to similar federal policies underlying each of these areas of protection, for the policies . . . are quite different." 488 U.S. at 333 n.7.

The NLRB has recognized the sharp distinction between WARN and the NLRA in holding that payments required by WARN may not be credited against payments required to remedy a violation of NLRA § 8(a)(5). In reaching that result the Board explained that "WARN payments remedy the [employer's] violation of its obligations to give advance notice of its decision to cease operations. The [NLRA] payments remedy the [employer's] violation of its obligations to allow for meaningful bargaining . . . ." *Times Herald Printing Co.*, No. 16-CA-15433, 1994 NLRB LEXIS 972, at *12 (NLRB Nov. 30, 1994).

b) WARN also differs dramatically from the NLRA in the remedies that are available under the two statutes.[17]

As discussed, a WARN suit cannot eventuate in any relief other than the payment of money. Under the NLRA, in contrast, to remedy an employer's failure to bargain in good faith over a decision (or the effects of a decision) as to which the Act requires bargaining, the NLRB will issue an order requiring the employer to bargain,[18] and the NLRB may order other relief of an injunctive nature including, in appropriate cases, an order to reopen an operation pending the required bargaining.[19] Even the backpay that may be awarded under the NLRA is measured very differently from the damages available under WARN.[20]

Thus, even if, on proper analysis, the choice of a limitations period for WARN Act claims turned simply on identifying "the best analogy" in state or federal law, Crown Br. 10, there still would be no basis for applying NLRA § 10(b) here.[21]

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[17] The focus of the Court's analysis in *DelCostello* was on the nature of the relief—setting aside an arbitration award—that was available in both hybrid suits and unfair labor practice proceedings. *See supra* at 15-16. So too, in *Agency Holding Corp.*, the Court focused on the similarity between the enforcement schemes of RICO and the Clayton Act, including the fact that both statutes provide for treble damages. *See* 483 U.S. at 150-152.

[18] *See, e.g., Stevens Pontiac-GMC*, 295 NLRB 599, 603 (1989).

[19] *See, e.g., Power Inc. v. NLRB*, 40 F.3d 409, 425 (D.C. Cir. 1994) (requiring employer to resume subcontracted operations in order to ensure meaningful bargaining).

[20] *Compare Transmarine Navigation Corp.*, 170 NLRB 389 (1968), with 29 U.S.C. § 2104(a)(1), (2).

[21] Petitioners make much of the fact that WARN contains three express references to the NLRA. *See* Crown Br. 16; North Star Br. 20. This does not advance petitioners' cause. Two of those references are intended *to ensure that WARN has no impact on NLRA rights and processes. See* 29 U.S.C. § 2103(2) (notice not required to economic strikers as defined under the NLRA); 29

II. IF IT WERE PROPER TO SELECT A FEDERAL STATUTE OF LIMITATIONS FOR WARN ACT CLAIMS, THE TWO-YEAR PERIOD STATED IN THE PORTAL-TO-PORTAL ACT WOULD BE MORE APPROPRIATE THAN THE SIX-MONTH PERIOD OF NLRA § 10(b)

As we have shown, this Court's decisions require that state limitations statutes be applied in WARN suits. But if that were not the case, and the Court were free to adopt a limitations period from another federal statute, the most appropriate place to look would not be to the NLRA's statute of limitations but rather to the express limitations periods stated in federal laws that establish substantive terms of employment.

There is, to repeat, a fundamental distinction between the NLRA on the one hand, and laws establishing minimum employment standards on the other. WARN falls squarely within the latter category. Pp. 23-25, *supra*. And, when Congress has created rights to sue in court to enforce other federal employment standards, Congress invariably has concluded that in enforcing substantive employment laws more than six months is needed to retain a lawyer, investigate, determine whether to sue, and then prepare and file a complaint. *Cf. Burnett v. Grattan*, 462 U.S. 42 (1984).

U.S.C. § 2108 (giving notice under WARN shall not constitute a violation of the NLRA). The third reference simply incorporates the NLRA definition of an exclusive "representative." 29 U.S.C. § 2101(a)(4). Nor is there any significance in the fact that the Labor Department and the courts have looked to NLRA precedent with respect to certain concepts that come into play under WARN, such as the distinction between employees and independent contractors, or between single and joint employers. *See* Crown Br. 18-19; North Star Br. 20-21. The same could be said of virtually all labor statutes—including the LMRDA, as to which the *Reed* Court rejected the application of NLRA § 10(b). *See, e.g., Machinists Lodge 702 v. Loudermilk*, 444 F.2d 719, 722 (5th Cir. 1971).

Given the substantive nature of the WARN Act, the most analogous federal statute of limitations is that contained in the Portal-to-Portal Act for actions "to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, *or liquidated damages*" under the Fair Labor Standards Act and kindred wage acts. As we have seen, the WARN Act creates a liability which Congress understood to be in the nature of "liquidated damages." *See* note 9 *supra*. That liability, like FLSA liquidated damages, is measured by an employee's "regular rate," 29 U.S.C. § 2104(a)(1)(A), a term of art under the FLSA. *See* 29 U.S.C. § 207.

Perhaps most telling, the WARN Act and the Portal-to-Portal Act both provide, in virtually identical words, that a court may "in its discretion" reduce the amount of liquidated damages upon proof that the employer acted "in good faith and . . . had reasonable grounds for believing that the act or omission was not a violation" of the law. 29 U.S.C. § 260 (Portal-to-Portal Act); 29 U.S.C. § 2104(a)(4) (WARN Act). And the legislative history confirms what is apparent on its face, that this provision of the WARN Act was modeled upon, and intended to be interpreted in conformity with, the Portal-to-Portal Act.[22]

Thus, if Congress intended to depart from the usual rule of borrowing state limitations periods as the source for limiting WARN actions, it is far more likely that Congress would have favored application of the Portal-to-Portal Act's two-year limitations period—which is in the mainstream of federal statutes of limitations for actions to enforce employment standards, *see* pp. 14-15, *supra*—than that Congress would have called for application of the NLRA's six-month statute of limitations, which was enacted to address claims that, unlike WARN Act suits, implicate the NLRA's "consensual processes,"

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[22] *See* S. Rep. 62, *supra*, at 24-25.

p. 15, *supra*.[23] Because this action was filed within two years after the cause of action accrued, it thus would be timely even if federal law were the appropriate source of the statute of limitations.

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[23] Indeed, application of a six-month statute of limitations to WARN Act claims would be peculiarly inappropriate given the number of relatively complex issues a potential plaintiff must consider in determining whether a violation has occurred. For example, if a plant continues in operation after a mass layoff, potential plaintiffs must assess the number and percentage of employees laid off over *any* thirty or ninety day period. 29 U.S.C. §§ 2101(a)(3), 2102(d). What is more, those numbers are affected by the number of employees who were offered transfers to other employment sites, *if* the offers comported with certain terms specified in the Act. 29 U.S.C. § 2101(b)(2). There are, as well, special provisions for situations where a layoff originally was announced as less than six months but ultimately extended beyond six months; the statutory test in that case turns on what was "reasonably foreseeable." 29 U.S.C. § 2102(c). Finally, the Act includes defenses that turn on two difficult determinations: (i) whether, "as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business," and (ii) whether "the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(1), (2)(A). *See also* § 2102(b)(2)(B) (exception for natural disasters); § 2103 (other exemptions).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,

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UNITED STEELWORKERS OF AMERICA,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE RESPONDENTS' ALMOST TOTAL RELIANCE ON THEIR INFLEXIBLE "RULE" FAVORING STATE LAW BORROWING IS MISPLACED

A. This Court's Decisions Are Not In Accord With The Rule Upon Which Respondents Rely

Respondents United Steelworkers of America, AFL-CIO-CLC (the "Union") and Charles Thomas, *et al.* (collectively "Thomas") rely almost exclusively on a supposedly inflexible rule "requiring" state law borrowing. Union Br. at 7; *see also* Thomas Br. at 8. This reliance is misplaced, however, because "[a]lthough it has been suggested that federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period . . . , a clear majority of the Court rejected such a single path." *Agency Holding*

Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 146 (1987). In fact, this Court's preference for state-law borrowing is merely a "fallback rule of thumb." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 & n.12 (1983). Accordingly, this Court has not hesitated to borrow limitations periods from federal statutes that provide better analogies than those available in state law. *See, e.g., Agency Holding Corp.*, 483 U.S. at 152; *DelCostello*, 462 U.S. at 169.

None of this Court's recent decisions have articulated, let alone followed, the inflexible rule urged by respondents. This Court has not "required" that express federal statutory claims be governed by state limitations periods. Union Br. at 7, nor has this Court limited federal law borrowing to circumstances where state limitations periods would "frustrate the policies of the federal enactment." Union Br. at 5. Rather, this Court has applied a flexible balancing approach which takes into account many factors, including whether state or federal law provides a closer analogy to the cause of action in question and whether federal policies and litigation practicalities support borrowing a uniform limitations period. *See, e.g., Agency Holding Corp.*, 483 U.S. at 150, 153-54; *DelCostello*, 462 U.S. at 172.

In fact, this Court has noted that the process of determining which statute to borrow, whether state or federal, "is a delicate one." *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, 501 U.S. 350, 356 (1991) (hereinafter *Lampf*). This delicate process of identification, analysis and balancing is simply inconsistent with the hard-and-fast "rule" mandating state law borrowing which respondents claim exists.

Moreover, since 1983 when this Court decided *DelCostello*, three of its six "borrowing" decisions ultimately held that a limitations period from elsewhere in *federal* law was applicable. *Lampf*, 501 U.S. at 355; *Agency Holding Corp.*, 483 U.S. at 156; *DelCostello*, 462 U.S. at 169.

This kind of decisional track record hardly comports with the respondents' claim to an invariable state-law borrowing rule.

Moreover, the Union's attempt to distinguish these three decisions borrowing a federal limitations period merely demonstrates the weakness of their position. For example, the Union argues that *DelCostello* is inapplicable to the analysis here because it involved an implied, rather than express, cause of action. Union Br. at 10. This Court, however, clearly stated that it "need not address" this issue because it would have reached the same result even if the cause of action had been express: "even if this action were considered as arising solely under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule." *DelCostello*, 462 U.S. at 159 n.12.

The Union's attempt to distinguish *Agency Holding Corp.*, in which this Court held that civil RICO claims were subject to the four-year limitations period of the Clayton Act, 483 U.S. at 156, is equally unpersuasive. The Union attempts to segregate *Agency Holding Corp.* from the instant analysis by arguing that this Court's selection of a federal statutory limitations period over a state common law analogue was hardly surprising because RICO's underlying "concepts" were "simply unknown at common law." Union Br. at 12. However, the same holds true for the WARN Act—plant closing notice requirements have no common law roots.

The Union further attempts to distinguish *Agency Holding Corp.* on the ground that RICO was based upon a federal statutory "antitrust model" and thus, the "clearest current" in the legislative history of RICO " 'is the reliance on the Clayton Act model.' " Union Br. at 12 But, the "clearest current" in the legislative history of the WARN Act is also its "reliance" on a federal statutory "model"—the National Labor Relations Act. Crown Br. at 15-18.

Finally, although the Union attempts to contrast the WARN Act's alleged simplicity to RICO's complexity, the Union itself claims that a significant number of "complex issues" will need to be decided in order to ascertain "whether a violation has occurred." Union Br. at 29 n. 23. And, the government concedes not only that WARN Act analogies would have to be identified on a state-by-state basis, but that an analogy adopted in one state could be rejected in another either because the law of the second state furnished "an even more precise analogue" or in order to avoid a limitations period perceived to be too "short." U.S. Br. at 27 n. 19. The fact that the "geographic character" of WARN Act claims frequently will be multistate, *see* Crown Br. at 31-32, should be "accorded particular weight" and " 'indicates the desirability of a uniform federal statute of limitations.' " *Lampf*, 501 U.S. at 357. Therefore, under the WARN Act, just as under RICO, state law borrowing would "present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.' " *Agency Holding Corp.*, 483 U.S. at 154.[1]

Indeed, if there were a rule "requiring" state law borrowing, this Court would have had no need in *Reed v. United Transportation Union*, 488 U.S. 319 (1989), to observe that federal law "d[id] not supply a more analogous statute" than state law. *Id.* at 334. Nor if state law borrowing were mandatory would there have been a

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[1] Likewise, though *Lampf* did involve an implied cause of action, this Court rejected a hard-and-fast rule in favor of its "delicate" analysis of factors favoring both state and federal limitations periods. *Lampf*, 501 U.S. at 356 (plurality opinion); *see also id.* at 368 (Stevens, J., dissenting) (noting that the *Lampf* Court "reject[ed] the traditional rule of applying a state limitations period when the federal statute is silent") and *id.* at 369 (O'Connor, J., dissenting) (agreeing "that predictability and judicial economy counsel the adoption of a uniform federal statute of limitations for actions brought under 10(b) and Rule 10b-5").

need for the *Reed* Court to discount *all* "exceptions" to state law borrowing prior to deciding to borrow from state law. *Id.* at 334.

B. This Court Should No Longer Give Great Weight To The Presumption That Congress Intended Courts To Apply State Limitations Periods

1. *In Light Of This Court's Recent Limitations Borrowing Decisions, This Court Ought Not To Assume That Congress Presumed That State Limitations Periods Would Govern WARN Act Claims*

The vitality of the respondents' rule mandating state law borrowing rises or falls with the weight, if any, which should be given to the presumption that Congress in recent years has continued to assume that state limitations periods will govern federal enactments. The primary, if not sole, underpinning for the "rule" favoring state law borrowing had been congressional awareness of this Court's past "practice" of borowing state law. That past practice had allowed this Court previously to assume that Congress intended by its silence that courts borrow state law. *See, e.g., International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704 (1966).

However, by 1988, when Congress enacted the WARN Act, the landscape had changed considerably. In 1983, this Court ruled that borrowing federal limitations periods was appropriate when a federal law "clearly provides a closer analogy than available state statutes" and "when the federal policies at stake and the practicalities of litigation" favor borrowing a federal limitations period. *DelCostello*, 462 U.S. at 172. And, only one year before passage of the WARN Act, this Court had held in *Agency Holding Corp.* that an express federal cause of action could be subject to a limitations period from a different federal statute with "similarities in purpose and structure." *Agency Holding Corp.*, 483 U.S. at 152. In reaching this decision, this Court made clear

that it had rejected a "single path" of state law borrowing, *id.* at 146, and it applied instead a balancing analysis, in which the availability of close federal analogies, the risk of forum shopping, the need for uniformity and certainty, and the danger of costly collateral litigation were weighed. *Id.* at 149-154. Accordingly, it was noted that *Agency Holding* established a "new rule" that "congressional silence" be interpreted to require, not the borrowing of state statutes of limitations, but rather the application of the "appropriate limitations period *state or federal.*" *Agency Holding,* 483 U.S. at 166 (Scalia, J., concurring in judgment) (emphasis in original).

In light of these decisions and the flexible borrowing analysis utilized by this Court, Congress would have been foolish to assume in 1988, a year after *Agency Holding Corp.*, that WARN Act claims routinely would be subject to state limitations periods. In fact, if anything, "it could be expected that Congress would adapt" to this "general change of approach" for all "statutes passed after the decision came down." *Agency Holding,* 483 U.S. at 167 n.4 (Scalia, J., concurring in judgment).

2. *The Congress Has Affirmatively Moved Away From Reliance Upon State Law Borrowing*

Even Congress has recognized that state law borrowing has little inherent value. In 1990, Congress enacted 28 U.S.C. § 1658, a federal "fallback" limitations period, because the practice of borrowing analogous state limitations periods had imposed "uncertainty on litigants" and because "reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods." H.R. Rep. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N 6860, 6870 (quoting *Report of the Federal Courts Study Committee* 93 (1990)).

And, perhaps even more significantly, the Congress recognized in 1990 that a presumption in favor of state

law borrowing no longer existed because "[a]t present, the federal courts 'borrow' the most analogous state *or federal* law limitations period for federal claims lacking limitations periods." *Id.* (emphasis added). Thus, no later than 1990 the Congress recognized that (1) the presumption favoring state law borrowing had been abandoned in favor of a rule which dictated borrowing the most analogous *state or federal* statute, (2) state law borrowing had created litigation problems, and (3) state limitations periods should not govern future legislation. Thus, at this stage, there seems little sense in adopting the position which respondents urge upon this Court—a strong adherence to an assumption about Congressional desire and intent which, even if it existed at some point in this generation, has long since, and not surprisingly, been abandoned.

II. VIEWED ON THE MERITS, IT IS CLEAR THAT THE NLRA IS THE FAR SUPERIOR BORROWING SOURCE FOR THE WARN ACT'S STATUTE OF LIMITATIONS

A. The NLRA Provides The Closest Analogy To The WARN Act In That They Share A Commonality Of Purpose And Similarity Of Elements

The Union does not dispute that the NLRA is this nation's premier labor statute "confer[ing] certain affirmative rights on employees and [placing] certain enumerated restrictions on the activities of employers." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). Nor does the Union dispute that one of these "affirmative rights" is the well-established and long-standing right to receive advance notice of an impending plant closing, relocation or other similar managerial action.[2] *See First*

[2] The Union concedes that long before the WARN Act became law, employers were already providing advance notice of plant closings and mass layoffs to comply with their obligations under the NLRA. Union Br. at 23. As the government explains, "[p]rior to the WARN Act's passage . . . unionized workers received an average of only 14 days' advance notice before a plant closing or

National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981). Finally, the Union does not dispute that the WARN Act codifies a right to receive such notice. Union Br. at 23.

Moreover, the Union and its amici do not challenge the litany of other similarities that Crown has catalogued between the WARN Act and the NLRA. Both the NLRA and the WARN Act afford protection not only to affected employees, but to the community at large as well, *see* Crown Br. at 14 n.4, and under both statutes, the amount of advance notice afforded may be reduced when an employer can demonstrate special or emergency circumstances. *See* Crown Br. at 14 & n.5. In addition, WARN and the NLRA provide analogous remedies—backpay for each day of violation. *See* Crown Br. at 15.[3]

Unable to make any meaningful distinctions between the WARN Act and the NLRA with regard to notice, the Union attempts to distinguish the two acts by labeling WARN Act rights as "substantive" and the analogous NLRA rights as "procedural." Such labels add nothing to the analysis here.

First, bargaining rights can be seen as substantive both because they provide employees with the right to force employers to negotiate and because such negotiations ultimately impact upon the terms and conditions of employment.

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mass layoff. . . . By mandating 60 days' notice for all workers, Congress clearly intended to supplement existing rights under the NLRA." U.S. Br. at 20.

[3] The Union correctly notes that back pay is but one aspect of a range of remedies which may be imposed on an employer for commission of an unfair labor practice. Union Br. at 26. This does not defeat the NLRA/WARN Act analogy, however. First, it makes sense that WARN Act remedies are a subset of those available under the NLRA, since the notice obligation, which the WARN Act shares with the NLRA, is but one facet of the numerous rights and responsibilties included within the NLRA. Second, so long as there is an overlap in remedies, an analogy is appropriate. *See Agency Holding Corp.*, 483 U.S. at 151.

Similarly, while rights, like those provided by the WARN Act, in some sense merely give a "procedural setting," i.e., notice in which to achieve some other result, they also affect the employment relationship. For example, a union will often have a continuing bargaining relationship with an employer, even after a WARN Act claim accrues.[4] In that instance, the WARN Act claim will provide unions more leverage with which to obtain benefits for their members. Thus, an employer's failure to provide sixty days advance notice will give the Union one more chip at either the effects bargaining table or as part of a continuing bargaining relationship between it and the multi-plant employer. Hence, the Union's assertion that the WARN Act has no impact on bargaining (Union Br. at 17 n.12) is incorrect.

Even in the non-union setting, the WARN Act affords an opportunity for increased leverage under the NLRA. In the face of impending employment loss non-union employees can engage in concerted activity and effectively exercise their NLRA Section 7 rights to extract "concessions" from their employer, much as unions do through formal collective bargaining.

Finally, even in the legal arena, there is no meaningful procedure/substance distinction. This Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724 (1985), upon which respondents rely, has nothing to do with the issue of limitations borrowing, and, contrary to respondents' arguments, does not delineate two separate categories of federal labor law.

In fact, in *Metropolitan Life,* this Court observed that the NLRA had both procedural and substantive goals. This Court recognized that the NLRA was intended not only to create an equitable process for determining the terms and conditions of employment, but also to resolve the substantive problem of "depress[ed] wage rates and

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[4] This will be true in the case of a mass layoff, or, as in this case, if the union represents employees at several of the employer's facilities.

the purchasing power of wage earners in industry." *Id.* at 754 (internal quotation omitted). This Court concluded that local or federal regulations which established minimum terms of employment were not inconsistent or incompatible with these goals. It certainly did not hold that the NLRA served only procedural ends. *Id.* at 754-55.

While the NLRA imposes certain obligations on employers planning to reduce their workforce, the Act does not dictate the results which flow from those obligations. In its simplest terms, the Act affords employees the *opportunity* to achieve for themselves severance pay, retraining or similar unemployment benefits.

Likewise, the WARN Act imposes certain notice obligations on the employer, but does not dictate the terms which may flow from the employee's use of that notice period. The notice affords employees the *opportunity* to seek retraining and a speedy reintegration into the workforce. Thus, even if the NLRA is characterized as procedural and the WARN Act as substantive, both statutes afford notice for the very same purpose, affording employees the *opportunity* to ameliorate the detrimental effects of economic dislocation.

In sum, the WARN Act is an outgrowth of the NLRA. The NLRA and the WARN Act share a common purpose and similar elements and they both aim to ameliorate the hardships of unemployment. As a result, the NLRA provides a clear, obvious and appropriate source for the WARN Act's limitation period.[5]

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[5] The NLRA is a far closer analogy to the WARN Act than the variety of unrelated state laws posited by the Union. *See* Crown Br. at 22-25. These laws offer nothing to support state law borrowing except that they contain limitations periods in excess of six months. Moreover, the FLSA is an equally inappropriate borrowing source as it does not share the WARN Act's principal purpose. The FLSA's legislative history shows that it was Congress' intent "to protect certain groups of the population from *substandard wages and excessive hours* which endangered the national health and well-being and free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 706 (1945) (emphasis

B. Borrowing the NLRA's Limitations Period Would Further the WARN Act's Purposes

1. *A Short Limitations Period Will Force Employees To Focus On Their WARN Act Rights Quickly*

Congress enacted the WARN Act to provide, among other things, notice of imminent dislocation in order to afford employees and the government the opportunity to promptly provide assistance such as counselling and retraining to enable workers to re-enter the job market as quickly as possible. *See* 20 C.F.R. § 639.1(a). As the Union's amici California Rural Legal Assistance, Inc., *et al.* (collectively "Amici") point out, "the success of counseling and job training assistance is often related to how early notice is provided to workers." Amici Br. at 16. According to the General Assounting Office, dislocated worker studies show that more workers will seek assistance if such assistance is available close to the time of job loss rather than years later. Amici Br. at 16.

A short limitations period will tend to force employees to focus on their WARN Act rights close to the time of the statutory violation. This will increase the likelihood that legal counsel will be sought and that employees will band together to take prompt collective action before they disperse or obtain alternative employment. Moreover, by encouraging focused, collective action, a short limitations period will likely enhance, rather than detract from, the prospects of employees demanding immediate assistance from their employers in exchange for waiving their WARN Act claims. The alternative, a

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added). Thus, under the FLSA, an employer must provide minimum wages and not exceed maximum hours for its non-exempt employees. The WARN Act, on the other hand, mandates no standards and is simply a *notice* statute in a loss of employment context. It has nothing to do with the main thrust of the FLSA which is to eliminate labor conditions detrimental to the maintenance of a minimum standard of living in an ongoing employment relationship. As a result, the FLSA offers no real analogy to the WARN Act.

lengthy limitations period might well tend to encourage claimants to sit on their WARN Act rights until they determine whether they secure other employment, relocate, etc. Thus, a short limitations period will create a greater likelihood that the issue of prompt assistance will be grappled with contemporaneously with the plant closing—the real purpose behind the WARN Act.[6]

Indeed, Congress's intent to encourage simple, fast and collective action is apparent on the face of the statute. Congress kept the statute short and simple, stating the notice obligation, the narrow defenses and the limited remedy in approximately five pages of text. 29 U.S.C. §§ 2101-2109. Congress encouraged simple class resolution by providing that any person may sue "for other persons similarly situated," 29 U.S.C. § 2104(a)(5), and it added an incentive for attorneys to pursue WARN claims by allowing the award of attorney's fees to prevailing parties. 29 U.S.C. § 2104(a)(6). The Act also contains a broad venue provision which permits suits to be filed in any judicial district in which "the employer transacts business," thereby lowering barriers to suit. 29 U.S.C. § 2104(a)(5). In light of these provisions as well as the underlying purpose of the statute, a lengthy statute of limitations would be incongruous.

2. *A Six Month Statutory Period Provides Sufficient Time In Which To Bring WARN Act Claims*

The government argues that six months is an insufficient period within which to vindicate WARN Act rights. *See* U.S. Br. at 23. There are at least three reasons why

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[6] The Union argues that "the statute of limitations issue arises only where employees sue for back pay because they have *not* received that 'immediate cushion.'" Union Br. at 14 n.9. This misses the point. Even in the event that a full sixty days notice is not provided, prompt collective action by employees is beneficial. Requiring the employees and the employer to focus on WARN Act rights close to the time of job loss will enhance the chances that employees will receive the necessary assistance and retraining to reintegrate into the job market.

this concern is unfounded. First, actual WARN Act litigation proves that a six-month limitations period is workable. Numerous represented *and* unrepresented plaintiffs have instituted litigation within six months or less. *See* Crown Br. at 29 n.14.

Second, it is virtually impossible to believe that a WARN Act event could pass undetected. While the government expresses concern that potential plaintiffs would be disadvantaged by a six-month limitations period because "a violation of the WARN Act may often be difficult to ascertain," U.S. Br. at 23, the usual situation will be one in which the employment loss is such a cataclysmic occurrence that it simply will not go unnoticed. Moreover, to the extent that a WARN Act violation is truly "difficult to ascertain," the normal discovery rule attendant to statutes of limitations would undoubtedly provide protection to claimants, *i.e.* the statute only begins to run when the plaintiff knew or *should have known* of the violation. *See, e.g., Urie v. Thompson,* 337 U.S. 163, 170 (1947).

Third, the easy availability of class litigation with respect to WARN Act claims argues against the government's concern, since one person can seek redress for all others. Thus, WARN Act rights can be vindicated even if only one potential claimant files within the six month period. And, given the availability of legal counsel in this country, the specific provision of the WARN Act providing for the award of counsel fees, 29 U.S.C. § 2104(a)(6), the relative ease under the Act of grouping large numbers of similarly situated claimants together (thereby setting the stage for a substantial aggregate award), and the publicity plant closings create, it seems unlikely that WARN Act claimants will find it difficult to acquire legal assistance. Further, many WARN Act plaintiffs, such as the Union in this case, are organizations comfortable in the environment of the rapid resolution of labor disputes. It is highly unlikely that employ-

ment losses, whether in the form of a plant closing or scattered mass layoffs, will escape their attention.[7]

3. *Application Of The NLRA's Six-Month Statute Of Limitations To WARN Act Claims Results In A Proper Balance Between The Interests Of Employers And Employees*

Statutes of limitations balance the interests of plaintiffs and defendants and protect important social interests in certainty, accuracy and repose. A six-month limitations period will protect employers from the assertion of stale claims [8] and allow them to quantify their contingent liabilities within a reasonable period of time, while still ensuring that employees will have adequate time within which to bring suit.

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[7] While it is true that the NLRA only requires that the employee file an administrative charge and not a lawsuit within the six-month period, *see* U.S. Br. at 24, this does not make a six-month limitations period inappropriate. First of all, Congress apparently believed that WARN Act claims were simple enough to be resolved directly in the courts, providing workers with generous venue provisions, simplied class procedures and attorney's fees in lieu of an administrative process. *See* 29 U.S.C. § 2104(a)(5), (6); *Halkias v. General Dynamics Corp.*, 31 F.3d 224, 239 n.5 (5th Cir.), *rehearing en banc granted*, 31 F.3d 248 (5th Cir. 1994) ("Indeed the absence of a complex administrative structure may be emblematic of the simplicity of a WARN claim.").

Secondly, other federal statutory schemes provide for relatively brief periods of time in which claimants must find lawyers and institute suit. For example, while it is true that charges of discrimination under Title VII are initially filed with administrative agencies such as the Equal Employment Opportunity Commission ("EEOC"), *see* U.S. Br. at 23-24 n.15, it is also true that once the EEOC issues its "right to sue letter" the claimant has only 90 days in which to institute a federal court action. *See* 42 U.S.C. § 2000e-5(f)(1). If it is not unreasonable in an employment discrimination setting to put plaintiffs to the test of finding legal counsel and instituting suit within three months, why is it unreasonable to give WARN Act claimants six months to bring their claims?

[8] The government admits that "[c]oncern for the possibility of stale claims could serve to rebut the presumption of state-law borrowing." U.S. Br. at 25.

The need for a short limitations period is particularly strong because of the subject matter of the WARN Act. After a plant closing or mass layoff, employees typically disburse, and the records of defunct businesses become harder to find. A short limitations period will ensure that evidence is available and events are fresh in the minds of those with knowledge. *See Wilson v. Garcia,* 571 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."); *see also Johnson v. Graphic Communications Int'l Union,* 930 F.2d 1178, 1182 (7th Cir.) (holding that NLRA's six-month limitations period prevents litigation after records have been destroyed and witnesses have relocated), *cert. denied,* 502 U.S. 862 (1991).

The government glibly dismisses the need for a short limitations period with the suggestion that an employer who is concerned with defending a WARN Act lawsuit simply maintain records necessary for its defense. *See* U.S. Br. at 25 n.16. This argument misses the point.

First, employees who may be necessary witnesses tend to disburse after a plant shutdown. Second, an employer's defenses to a WARN Act claim may not be based solely on documentary evidence in its possession. Rather, an employer may launch a defense based on, for example, a precipitous and unexpected drop in consumer demand or the market price of goods which cannot be proved by documents in the employer's possession, custody or control. *See* 20 C.F.R. § 639.9(b). In any event, the closer a lawsuit is filed to the time of a plant closing or mass layoff, the more effective the presentation of the case for *both* plaintiff and defendant.

Beyond the problem of litigating stale claims, continuing employers, if faced with the lack of clarity brought about by a state law borrowing regime, will be handicapped in attempting to operate in the present and plan for the future. Unknown potential WARN Act liability

under a state law borrowing scheme, which could be substantial especially for struggling companies, would cast a cloud over the company's ability to deal with vendors, borrow money from banks, make decisions about capital investments, or even sell off the company itself. Hence, because state law borrowing would leave businesses unable to " 'calculate their contingent liabilities, not knowing with confidence when their delicts lie in response,' " *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.3), such a limitations scheme would seriously restrict the ability of companies to go about their business.

III. BORROWING THE LIMITATIONS PERIOD OF THE NLRA WOULD MINIMIZE LITIGATION PROBLEMS

A. It Would Be Anomalous To Impose Different Limitations Periods For The Same "Failure To Give Notice"

The NLRA and the WARN Act share a commonality of purpose and similarity of structure. Both require an employer to provide advance notice to employees of imminent job loss. Nonetheless, state law borrowing exposes an employer to serial litigation over the same "wrongful act" and encourages wasteful and inefficient use of judicial resources. Employees can challenge a failure to give adequate notice under the NLRA within the six month limitations period and many years later relitigate the same claim under the WARN Act, honed and refined by their experience.

While overlapping causes of action are certainly not unique to the WARN Act and the NLRA, the ability to litigate these claims in divergent time frames encourages abuse of the system and adds complexity to litigation. For example, a union attempting to overcome an employer's successful defense of emergency circumstances

in the initial NLRA proceeding will certainly recast and refine its presentation in its second bite at the apple.[9]

B. Borrowing State Limitations Periods Would Encourage Forum Shopping, Create Uncertainty And Encourage Expensive Collateral Litigation

The Union does not challenge the fact that with state law borrowing the WARN Act's broad venue provision will "present the danger of forum shopping." *Agency Holding Corp.*, 483 U.S. at 154. The Union acknowledges the risk of forum shopping, but it posits that the problem can be minimized through the adoption of a uniform "generic characterization" of all WARN Act Claims. Union Br. at 19. There are multiple problems with this argument.

First, it is impossible to select a uniform state law analogue to the WARN Act, because it is a statutory creation without common law roots.[10] Indeed, the government recognizes that uniform, nationwide characterization may not be appropriate either because closer analogies might be available in some states or because the limitations period associated with the best analogy was too short. U.S. Brief at 27 n.19.

Second, contrary to the Union's misleading characterization of the WARN Act as "plain-vanilla," *see* Union Br. at 13, it is a statute presenting a range of "complex issues," Union Br. at 29 n.23, and where for example, there are at least two separate causes of action which can arise under the Act. The first, which is at issue in this litigation, is a private cause of action brought by em-

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[9] Issues of res judicata and collateral estoppel only add levels of complexity to this scenario. The WARN Act presents special problems in this regard because the courts have not yet had the opportunity to develop and refine the terms and contours of the statute.

[10] Thus, it is not surprising that there has been a wide divergence of opinion on how to characterize these claims in the federal courts and even within respondents' camp. The Union and its amici propose a potpourri of Pennsylvania statutes with varying limitations

ployees or their representative. The second is a potential cause of action asserted by the unit of local government. *See* 29 U.S.C. § 2104(a)(5). With state law borrowing, not only must the federal court decide upon the appropriate limitations period for the private cause of action, but it must decide whether there is a different limitations period for the governmental claim and what that limitations period should be.

Third, "generic characterization" will not eliminate forum-shopping. Even for a single, nationally available cause of action, there are widely divergent limitations periods throughout the fifty states.[11] A potentially tardy plaintiff could browse through the available jurisdictions until one is found which will accommodate his/her claim.[12]

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periods as well as the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* The only commonality among these limitations periods is the fact that they are in excess of six months and they do not contain a notice obligation in the event of an employment loss, the WARN Act's central and motivating purpose.

[11] One need look no further than the limitations periods for contract claims to illustrate this problem. *See, e.g.*:

Alabama:	six years, Ala. Code § 6-2-34.
Florida:	five or four years, Fla. Stat. Ann. §§ 95.11(2)(b), (3).
Indiana:	ten, six or two years; Ind. Code §§ 34-1-2-2, 34-1-2-1, 34-1-2-1.5.
Iowa:	ten, five or two years, Iowa Code §§ 614.1(5), (4), (8).
Kansas:	five or three years, Kan. Stat. Ann. §§ 60-511, 60-512.
Kentucky:	fifteen or five years, Ky. Rev. Stat. Ann. § 413.090(2); 413.120(1).
Michigan:	six years, Mich. Comp. Laws § 600.5807(8).
Ohio:	fifteen or six years, Ohio Rev. Code Ann. §§ 2305.06, 2305.07.

[12] Moreover, the majority of circuit courts borrow the limitations period of the forum state regardless of the site of injury, thereby increasing the likelihood of forum-shopping. *See* Crown Br. at 30 n.15. Even in those circuit courts which do not adopt the forum

Fourth, if the government is correct, and different state law analogies must be identiffed on a state-by-state basis, costly collateral litigation and uncertainty would be inevitable. In every state, litigants will be forced to fight among various state law analogies, based both on whether they provide appropriately "precise" analogies to the WARN Act and on whether the limitations period of a precise analogy was too short. U.S. Brief at 27 n.19. In addition, litigants would have no way to determine what limitations period governed their claims, creating intolerable uncertainty for all.

Finally, while broad venue provisions with their invitation to forum-shopping and other litigation complexities do not begin and end with the WARN Act, there is no reason to encourage them through blind adherence to a "rule" of state law borrowing. This is particularly true where, as in the case of the WARN Act, there is no state law analogue. Although forum-shopping is not determinative in this Court's borrowing analysis, it is clearly a negative factor which militates against resort to adoption of state limitations periods. *Agency Holding Corp.*, 483 U.S. at 154. In the WARN Act setting, forum shopping will be encouraged by state-law borrowing not only as a matter of convenience or simply to gain a "home-state edge," but because the very vitality of the claim is likely to be at stake, i.e. an action is time-barred in one jurisdiction but not in another. It is when there are such differences in the law that forum shopping with all of its attendant "races to the courthouse" and "first-filed" battles is at its worst, and the unnecessary burden on the litigants and the courts is at its greatest.

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state's statute of limitations but look to the forum with the dominant contacts, preliminary and possibly dispositive choice of law issues will guarantee complex and time consuming litigation over collateral matters and undermine the WARN Act's uniform character and scope. *See Agency Holding Corp.*, 483 U.S. at 154; Crown Br. at 31.

CONCLUSION

For the foregoing reasons and those stated in Crown's opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 94-834 and 94-835

In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY, PETITIONER

v.

CHARLES A. THOMAS, ET AL.

CROWN CORK & SEAL CO., INC., PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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36 pp

QUESTION PRESENTED

Whether civil actions brought under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.*, which contains no statute of limitations, are subject to the most analogous state statute of limitations or to the six-month limitations period for filing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101 *et seq.*, requires covered

employers to give employees or their representatives 60 days' notice of a plant closing or mass layoff. These cases present the question of the appropriate statute of limitations in a civil action brought under the Act. The WARN Act grants the Secretary of Labor authority to "prescribe such regulations as may be necessary to carry out" the Act. 29 U.S.C. 2107(a). The Secretary has promulgated regulations that "establish basic definitions and rules for giving notice" under the Act, 20 C.F.R. 639.1(b), which are part of a coordinated effort to assist dislocated workers. 20 C.F.R. 639.1(f); see 20 C.F.R. Pt. 639. Those regulations implement the purposes and policies of the WARN Act, which are implicated in the determination of an appropriate limitations period. The United States therefore has a substantial interest in the effective enforcement of the WARN Act's prohibitions through the civil actions expressly authorized by that Act, and in the proper resolution of the question presented in these cases.

STATEMENT

1. With exceptions not relevant here, the WARN Act provides that an employer of 100 or more employees "shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. 2102(a). The Act requires that the notice be served "to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee." 29 U.S.C. 2102(a)(1). Notice must also be given to "the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C. 1651 et seq.]," and to "the chief elected official of the unit of local government within which [the] closing or layoff is to occur." 29

U.S.C. 2102(a)(2). The Act identifies those plant closings or mass layoffs for which an employer must give notice according to the number of employees affected, 29 U.S.C. 2101(a)(2) and (3), and defines affected employees as those who "may reasonably be expected to experience" an "employment loss," including termination, a layoff longer than six months, or a greater than 50% reduction in work hours for each of six months. 29 U.S.C. 2101(a)(5) and (6).

The Act provides that "[a]ny employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff." 29 U.S.C. 2104(a)(1). An aggrieved employee may collect "back pay for each day of violation," 29 U.S.C. 2104(a)(1)(A), "up to a maximum of 60 days." 29 U.S.C. 2104(a)(1). An employer who fails to give the requisite notice to an affected unit of local government "shall be subject to a civil penalty of not more than $500 for each day of such violation." 29 U.S.C. 2104(a)(3). An aggrieved employee, his representative, or an aggrieved unit of local government may file a civil action "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. 2104(a)(5). The WARN Act does not establish a statute of limitations for the civil actions authorized by Section 2104(a)(5).

2. These consolidated cases involve suits against employers who are alleged to have violated the Act. Respondents in *North Star* are several non-unionized employees. Respondents filed suit against petitioner North Star Steel Company (NS) on October 23, 1992, alleging that North Star had failed to give 60 days' notice before laying off 270 workers at a Pennsylvania plant on

February 25, 1991. NS Pet. App. 17a. On North Star's motion for summary judgment, the district court held that suits brought under the WARN Act are governed by the six-month limitations period for filing an unfair labor practice charge with the National Labor Relations Board (NLRB) under Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(b). NS Pet. App. 24a. The court therefore dismissed the employees' suit as untimely. *Id.* at 24a-25a. The court rejected respondents' contention that the suit should be governed by the three-year statute of limitations contained in Pennsylvania's Wage Payment and Collection Law. *Id.* at 18a-19a.[1]

In *Crown Cork*, respondent United Steelworkers of America filed suit on October 15, 1992, on behalf of unionized employees. The complaint alleged that petitioner Crown Cork & Seal Company (CC), a national corporation headquartered in Philadelphia, had laid off 85 employees at its Georgia plant on September 30, 1991, without giving 60 days' advance written notice. CC Pet. App. 17a-18a. Relying on the Second Circuit's decision in *United Paperworkers International Union* v. *Specialty Paperboard, Inc.*, 999 F.2d 51 (1993), the

[1] This action by non-union employees followed a successful WARN Act suit brought by the United Steelworkers of America on behalf of unionized employees against North Star arising out of the same layoff. Although the union filed its action more than six months after the layoff, North Star failed to assert a statute-of-limitations defense, and the district court granted summary judgment for the union. See NS Pet. App. 3a. The district court subsequently awarded the union employees back pay for each calendar day of the violation, and the court of appeals affirmed. *United Steelworkers* v. *North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992), aff'd in part, vacated in part on other grounds, 5 F.3d 39, 42 (3d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994).

district court held that "Pennsylvania law provides the appropriate limitations period for civil suits under the WARN Act" and denied Crown Cork's motion for summary judgment. CC Pet. App. 22a, 23a. The court deemed it unnecessary to "determine the particular Pennsylvania statute from which to borrow" because the union's suit was timely under all of the potentially applicable state statutes suggested by the parties. *Id.* at 22a.

3. The court of appeals affirmed the district court's order in *Crown Cork* and reversed the district court's order in *North Star*. NS Pet. App. 1a-16a.[2] The court held that "for actions arising under WARN, courts must apply the most closely analogous state statute of limitations," *id.* at 15a, and it therefore rejected petitioners' contention that the six-month limitations period in Section 10(b) of the NLRA should apply to WARN Act claims, NS Pet. App. 6a-11a.

The court of appeals first noted the general rule that "when a federal statute is silent as to a statute of limitations, the court should apply 'the most closely analogous statute of limitations under state law.'" NS Pet. App. 5a (quoting *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983)). The court

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[2] The Third Circuit's decision in the instant cases and the Second Circuit's earlier decision in *United Paperworkers*, *supra*, conflict with subsequent decisions of the Fifth and Sixth Circuits holding that the six-month limitations period of Section 10(b) of the NLRA applies to WARN Act claims. *United Mine Workers* v. *Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994), petition for cert. pending, No. 94-1398 (filed Feb. 16, 1995); *Halkias* v. *General Dynamics Corp.*, 31 F.3d 224 (1994), reh'g en banc granted, Nos. 93-1664, 93-1680 & 93-8204 (5th Cir. Sept. 22, 1994). The issue is also pending in the Tenth Circuit. *Frymire* v. *Ampex Corp.*, Nos. 94-1059 & 94-1090 (argued Mar. 6, 1995).

acknowledged that "it is sometimes more appropriate to borrow a limitations period from an analogous area of federal law," but observed that this exception is "closely circumscribed." NS Pet. App. 6a (quoting *Reed* v. *United Transp. Union*, 488 U.S. 319, 324 (1989)). The court explained that the exception should be invoked only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." NS Pet. App. 6a (quoting *DelCostello*, 462 U.S. at 172). It emphasized that "the mere fact that a statute touches upon issues of labor law does not mean that the Court must resort to the statute of limitations contained in § 10(b) of the NLRA." *Ibid.*

Applying those principles, the court of appeals concluded that a "vast gulf" exists between the policies underlying the NLRA and the WARN Act. NS Pet. App. 7a, 11a. The primary purpose of the NLRA, the court stated, is to protect the right of workers to organize, to bargain collectively for the terms and conditions of their employment, and to ensure that the bargaining process is fair. The NLRA is not, however, concerned with the substantive terms that emerge from collective bargaining. *Id.* at 7a. The NLRA's six-month statute of limitations for charging an unfair labor practice, the court observed, "represents Congress's view of the proper balancing of the various interests involved in the process of collective bargaining." *Ibid.*

By contrast, the court noted, "any effects [the WARN Act] has on collective bargaining are tangential at best. The benefits of WARN accrue not only to unionized workers but to all workers alike." NS Pet. App. 8a. Moreover, by requiring notice to affected units of local

government, and by permitting local governments to collect civil penalties if the requisite notice is not given, "WARN serves a broader purpose as well, that goes beyond the employer-employee relationship addressed by the NLRA." *Id.* at 9a. The court thus distinguished the WARN Act's notice requirement, which confers "an across-the-board substantive right" on all employees and their communities, from the requirement under the NLRA to provide notice of a plant closing to represented workers, which "protect[s] the meaningfulness of the collective-bargaining process." *Id.* at 10a.

The court of appeals rejected petitioners' argument that application of "multiple state statutes of limitations" to WARN Act claims would raise "serious uniformity concerns." NS Pet. App. 12a. Unlike 42 U.S.C. 1983 and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964, which encompass more complex actions and warrant application of uniform limitations periods, "WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries." NS Pet. App. 13a. Moreover, the court suggested, the WARN Act's venue provision does not provide an especially broad choice of fora, and the site-based nature of a violation should facilitate the identification of the State in which the violation allegedly occurred. *Ibid.* The court further reasoned that the brief six-month limitations period applicable to the filing of charges with the NLRB under the NLRA could "constitute too great a burden" on WARN Act claimants, whose formal complaints must be filed in federal court. *Id.* at 14a. The court concluded that it "need not decide which state statute applies, since the actions would be timely under any of the possible

statutes of limitations brought to the court's attention." *Id.* at 15a.[3]

SUMMARY OF ARGUMENT

When a federal law provides a cause of action but contains no statute of limitations, this Court's usual practice is to "borrow" a state law limitations period. Petitioners contend that suits under the WARN Act should be governed not by state statutes of limitations, but by the six-month limitations period for bringing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b). That contention should be rejected.

A. Section 10(b)'s comparatively short limitations period reflects Congress's desire for swift resolution of claims implicating the collective bargaining relationship. This Court has stressed in particular the need for expeditious resolution of disputes the outcome of which may affect the continuing relationship between contracting parties. Civil actions under the WARN Act, by contrast, are typically filed after dissolution of the employment relationship. More generally, the NLRA governs the *process* of collective bargaining and private dispute resolution, but does not dictate the substantive terms of the agreement; the WARN Act imposes a substantive obligation that cannot be avoided by agreement of the parties and that augments any similar obligation that the employer has assumed by contract.

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[3] The alleged statutory violation in *Crown Cork* occurred in Georgia, although the suit was filed in Pennsylvania. The court of appeals noted that it "need not decide whether the statute of limitations should be borrowed from Pennsylvania or Georgia law, since no party has brought to the lower courts' attention a statute of limitations, from either state, under which the instant actions would be untimely." NS Pet. App. 14a n.4.

There is consequently no basis for petitioners' attempt to analogize WARN Act suits to unfair labor practice charges under the NLRA.

B. That conclusion is not altered by the fact that some WARN Act violations will also constitute unfair labor practices prohibited by the NLRA. The overlap is far from complete, since the WARN Act applies to unrepresented as well as represented workers and requires more extensive notice than was typically provided to unionized employees before its passage. Moreover, the two Acts serve distinct purposes even with respect to conduct that is governed by both. The WARN Act presumes the termination of the relationship between employer and employees and serves to alleviate the effects of that termination by providing workers time to seek new positions. The NLRA notice requirement, by contrast, serves to facilitate bargaining between the employer and the union regarding the effects of a plant closing.

C. The practicalities of litigation also weigh against application of Section 10(b)'s limitations period to WARN Act claims. Institution of a WARN Act suit will often involve extensive investigation, and will always require the filing of a complaint in court, at a time when the disruptions caused by recent job loss are likely to distract an employee from prosecution of his claim. Application of state law limitations periods, by contrast, will create no extraordinary litigation burdens.

D. Because neither petitioner identifies any potentially applicable state limitations period under which the actions here would be untimely, this Court may affirm the judgment of the court of appeals without deciding which state limitations period is most appropriately applied to WARN Act suits. If this Court chooses to decide that question, however, we believe that

it would be appropriate to apply Pennsylvania's three-year limitations period for actions to recover "unpaid wages or liquidated damages." 43 Pa. Stat. Ann. § 260.9a(g) (1992). Like an award of back pay under the WARN Act, recoveries under that Pennsylvania statute serve both to compensate aggrieved employees for lost wages, and to deter and punish employers' violations of their legal duties.

ARGUMENT

THE STATUTE OF LIMITATIONS FOR WARN ACT CLAIMS SHOULD BE BORROWED FROM THE MOST CLOSELY ANALOGOUS STATE LAW

A. When A Federal Statute Creates An Express Cause Of Action But Establishes No Limitations Period, The Most Closely Analogous State Statute Of Limitations Is Presumptively Applicable

Like many federal statutes, the WARN Act provides a cause of action for violations but contains no express statute of limitations. "In such situations [the Court does] not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, [its] task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). This Court's decisions recognize a "general rule that statutes of limitations are to be borrowed from state law." *Reed* v. *United Transp. Union*, 488 U.S. 319, 324 (1989); accord *DelCostello*, 462 U.S. at 158 ("We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law."). "Given [the Court's] longstanding practice of borrowing state law, and the congressional awareness of this practice, [the Court] can

generally assume that Congress intends by its silence that [the Court] borrow state law." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987).[4]

Petitioners contend that suits under the WARN Act should be governed not by state limitations periods, but by the six-month limitations period for filing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(b). Petitioners place principal reliance on *DelCostello*, in which this Court held that the Section 10(b) limitations period applied to a "hybrid" suit by employees against both their employer and their union for breaches of the collective bargaining agreement (under Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185) and of the duty of fair representation. See 462 U.S.

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[4] This Court's earlier decisions applied state statutes of limitations to federal claims as a matter of state law, unless Congress expressly provided otherwise. *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-704 (1966); see *Campbell* v. *Haverhill*, 155 U.S. 610, 614-616 (1895); *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) 270, 277-278 (1830); *Agency Holding*, 483 U.S. at 159-162 (Scalia, J., concurring in the judgment). In more recent decisions the Court has continued to hold that state limitations periods apply to federal actions, but on the slightly different theory that Congress's failure to provide a limitations period constitutes an implicit federal directive to "borrow" the state law limitations period for federal claims. *Agency Holding*, 483 U.S. at 158, 164 (Scalia, J., concurring in the judgment); see *Hoosier Cardinal*, 383 U.S. at 706; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946) ("As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."). The result remains, however, that state limitations periods presumptively govern the timeliness of federal claims. See *Hoosier Cardinal*, 383 U.S. at 704.

at 154-155.[5] In our view, *DelCostello* provides scant support for petitioners' position.

The Court in *DelCostello* expressly gave its holding a narrow scope, stressing that the decision "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere." 462 U.S. at 171. The Court reaffirmed that principle in *Reed*, holding that state limitations periods should apply to a union member's claim, under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411(a)(2), that a union had violated his right to

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[5] Petitioner North Star also contends (NS Br. 32-37) that the Court should abandon its practice of borrowing state limitations periods in light of the recent passage of a residual federal statute of limitations. See 28 U.S.C. 1658 (Supp. V 1993) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."). That argument is without merit. Section 1658 applies by its terms only to claims arising under federal statutes "enacted after the date of the enactment of" that section (December 1, 1990), and it therefore "has no application in the present litigation." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n.10 (1991). Congress's refusal to make Section 1658 applicable to actions brought under previously enacted laws indicates its intent that existing legal standards be applied to such statutes. Cf. *Agency Holding*, 483 U.S. at 147. Even if it were relevant to the instant cases, moreover, Section 1658 does not reflect a policy judgment that the most analogous federal limitations period should be "borrowed." It reflects instead Congress's decision that a relatively long (four-year) limitations period should apply unless Congress has expressly enacted a different one. Section 1658 therefore could hardly support petitioners' argument that the suits at issue here, which were filed less than two years after respondents' causes of action accrued, should be dismissed as untimely.

free speech regarding union matters. 488 U.S. at 323. The Court declined to apply the NLRA's six-month limitations period, reiterating that, "'in labor law or elsewhere,' application of a federal statute will be unusual, and 'resort to state law remains the norm for borrowing of limitations periods.'" *Id.* at 324 (quoting *DelCostello*, 462 U.S. at 171). The Court noted that it "decline[s] to borrow a state statute of limitations only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" 488 U.S. at 324 (quoting *DelCostello*, 462 U.S. at 172). *Reed* thus makes clear that the presumption in favor of state-law borrowing survives *DelCostello*, and that it applies with full force to federal labor statutes.[6]

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[6] This Court's subsequent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), casts no doubt on the continuing vitality of those principles. The Court in *Lampf* faced "the awkward task" of determining the appropriate statute of limitations for a cause of action implied under a federal statute. *Id.* at 359. The Court "conclude[d] that where * * * the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Ibid.*

Lampf is inapposite here for two reasons. First, the WARN Act provides an *express* right of action. 29 U.S.C. 2104(a)(5). Congress's silence regarding the appropriate limitations period thus suggests congressional acquiescence in this Court's "longstanding practice of borrowing state law," *Agency Holding*, 483 U.S. at 147—an inference that would not be legitimate where

For the reasons that follow, unfair labor practice charges filed with the NLRB under the NLRA furnish a distinctly inapt analogy for suits brought in court under the WARN Act. Application of Section 10(b)'s six-month limitations period in the instant cases is therefore unwarranted.

B. The NLRA Protects The Process Of Collective Bargaining And Private Dispute Resolution, While The WARN Act Confers Substantive Rights Separate And Distinct From The Collective Bargaining Process

1. The purpose of the NLRA is to achieve industrial peace by protecting the rights of workers to organize and to bargain collectively over the terms and conditions of their employment. See 29 U.S.C. 151; 29 U.S.C. 141(b) (Labor Management Relations Act, 1947); *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981). To that end, the NLRA focuses on "the formation of the collective agreement and the private settlement of disputes under it" through the grievance and arbitration system. *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966). Section 10(b) was tailored to effectuate those goals. It provides that the General Counsel shall not issue a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b); see 29 U.S.C. 153(d) (functions of General Counsel). In providing for the swift disposition of disputes, "Congress established a limitations period

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the cause of action itself is implied. See *Lampf*, 501 U.S. at 365 (Scalia, J., concurring in part and concurring in the judgment). Second, petitioners in this case do not argue that the limitations period for civil actions under Section 2104(a)(5) should be drawn from some other provision in the WARN Act; they contend instead that the Court should adopt the limitations provision of a different federal statute enacted more than 40 years earlier.

attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system."–*DelCostello*, 462 U.S. at 171 (quoting *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 70 (1981) (Stewart, J., concurring in the judgment)).

Explaining its decision to apply the NLRA's six-month limitations period to hybrid Section 301/duty-of-fair-representation suits, the *DelCostello* Court stressed the importance of speedy resolution of disputes concerning the collective bargaining process, observing that

> the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. This system, with its heavy emphasis on grievance, arbitration, and the law of the shop, could easily become unworkable if a decision which has given meaning and content to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as three years later.

462 U.S. at 169 (quoting *United Parcel Serv.*, 451 U.S. at 64 (brackets, ellipsis, and internal quotation marks omitted). The Court thus recognized that application of the NLRA's comparatively short limitations period to hybrid Section 301/duty-of-fair-representation suits is justified, in substantial measure, by the fact that adjudication of such actions (like the NLRB's investigation and prosecution of unfair labor practice charges) frequently involves resolution of disputes whose outcome may affect the *continuing* relationship

between contracting parties.[7] The smooth functioning of that relationship obviously depends upon expeditious resolution of any disputes that may arise. Civil actions under the WARN Act, by contrast, are typically filed *after* the dissolution of the employment relationship, and a central justification for the unusually short limitations period established by Section 10(b) of the NLRA is consequently inapplicable.

2. More generally, a claim under the WARN Act neither resembles an unfair labor practice charge nor directly implicates the "federal interests in stable bargaining relationships and in private dispute resolution" between represented workers and employers that the six-month limitations period of Section 10(b) accommodates. *Reed*, 488 U.S. at 333.[8] The NLRA is

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[7] As this Court observed in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), "[t]he processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement"; "[t]he grievance procedure is, in other words, a part of the continuous collective bargaining process." The arbitrator's resolution of a grievance thus does more than terminate a particular dispute. It serves as well to shape the contracting parties' understanding as to the parameters of their agreement, and forms part of the backdrop to their subsequent negotiations. Given the influence of arbitral decisions upon subsequent interaction between the parties, speedy resolution of any challenges to those decisions is essential.

[8] In *Reed*, the Court explained that in *DelCostello* "[t]he specific focus of our comparison between unfair labor practice charges governed by § 10(b) and hybrid § 301/fair representation claims was their effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures." 488 U.S. at 329. This Court in *Reed* deemed the interests in stable bargaining relationships and private dispute

"concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 753 (1985); accord *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 20 (1987). The WARN Act, by contrast, imposes a substantive obligation that cannot be avoided by agreement of the parties[9] and that augments any similar obligation that the employer has assumed by contract.[10] Moreover, the

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resolution implicated in only a "tangential and contingent" fashion (488 U.S. at 328) by free speech claims brought by a union member under Title I of the LMRDA, 29 U.S.C. 411(a)(2). Because the LMRDA is concerned with internal union affairs, it was "not directly related in any way to collective bargaining or dispute settlement under a collective-bargaining agreement." *Reed*, 488 U.S. at 330. The Court contrasted an LMRDA suit to "hybrid" Section 301/duty-of-fair-representation claims, "which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures." *Id.* at 331. Accordingly, the Court analogized the LMRDA action to a state personal injury claim and refused to apply the six-month limitations period of Section 10(b).

[9] See 20 C.F.R. 639.1(g) ("[c]ollective bargaining agreements" may "clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights").

[10] An employer's WARN Act liability may be offset by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. 2104(a)(2)(B). The legislative history indicates that this language was fashioned to ensure that severance payments made pursuant to a collective bargaining agreement could not be deducted in determining the employer's WARN Act liability. Cf. 134 Cong. Rec. 15,928 (1988) (Sen. Metzenbaum) (opposing proposed amendment on the ground that "the employees may already be entitled to severance pay and benefits under a collective bargaining agree-

WARN Act's provision for civil penalty actions by affected units of local governments has no analogue in the NLRA.

In short, the WARN Act "implements a federal policy * * * that simply had no part in the design of a statute of limitations for unfair labor practice charges." *Reed*, 488 U.S. at 332. The WARN Act thus resembles the state "minimum substantive labor standard[]" at issue in *Fort Halifax*, 482 U.S. at 20, which this Court held not to be preempted by the NLRA because it "does not intrude upon the collective-bargaining process." *Id.* at 6-7. The Maine law in *Fort Halifax* required certain employers that closed or relocated their businesses to make severance payments according to a statutory formula; it authorized affected employees, or a state official in their stead, to sue a noncomplying employer to recover the severance pay. *Id.* at 5. Like the Maine law, the WARN Act protects "individual union and nonunion workers alike, and thus 'neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA.'" *Id.* at 21 (quoting *Metropolitan Life*, 471 U.S. at 755). Absent an effect on collective bargaining, it would therefore be inappropriate to subject WARN Act claims to the NLRA's six-month limitations period. See *United Paperworkers International Union* v. *Specialty Paperboard, Inc.*, 999 F.2d 51, 54 (2d Cir. 1993).[11]

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ment[.] * * * The [proposed] amendment would allow employers who already owe severance pay to escape the notice requirement simply by paying the severance they already owed. * * * [T]hat is unfair."). See also 29 U.S.C. 2105 (WARN Act rights are "in addition to, and not in lieu of, any other contractual or statutory rights or remedies of the employees").

[11] In *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Court applied a state limitations period to a union's

3. Petitioners also emphasize (NS Br. 19; CC Br. 12-15) that where employees are represented by a union, Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), requires an employer to bargain over the effects of a decision to shut down part of its business. See *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). Because such bargaining "must be conducted in a meaningful manner and at a meaningful time," *id.* at 682, an employer's failure to give adequate notice of its intention to close a plant will sometimes constitute an unfair labor practice. Petitioners argue that this overlap between the prohibitions of the NLRA and the WARN Act suggests a congruence of purpose that justifies application of the Section 10(b) limitations period to WARN Act suits. That argument is without merit.

First, it is hardly the case that every violation of the WARN Act will also constitute an unfair labor practice

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suit under Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185, for breach of a collective bargaining agreement by an employer. Discussing that prior decision, the Court in *DelCostello* stressed the distinction between a "straightforward breach-of-contract suit under § 301," like *Hoosier Cardinal*, and a hybrid Section 301/duty-of-fair-representation claim, "amounting to a direct challenge to the private settlement of disputes under the collective-bargaining agreement." 462 U.S. at 165 (brackets and internal quotation marks omitted). The Court in *DelCostello* thus made clear that suits implicating private resolution of disputes affecting the collective bargaining process raise concerns distinct from other actions grounded in federal labor law. See also *id.* at 162-163 ("national uniformity is of less importance when the case does not involve 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it' ") (quoting *Hoosier Cardinal*, 383 U.S. at 702).

prohibited by the NLRA. Unlike Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), which requires the employer "to bargain collectively with the representatives of his employees" regarding the effects of a plant closing, the WARN Act confers a right to notice of an impending plant closing upon represented and unrepresented workers alike, as well as upon enumerated governmental entities. Prior to the WARN Act's passage, moreover, unionized workers received an average of only 14 days' advance notice before a plant closing or mass layoff. See S. Rep. No. 62, 100th Cong., 1st Sess. 13 (1987). By mandating 60 days' notice for all workers, Congress clearly intended to supplement existing rights under the NLRA.

Second (and more fundamentally), the WARN Act and the NLRA serve distinct purposes even with respect to conduct that is governed by both.[12] The purpose of the WARN Act's notice requirement is to protect "workers, their families and communities" by providing "transition time to adjust to the prospective loss of employment," to seek other jobs, and to obtain "skill training or retraining" to "compete in the job market." 20 C.F.R. 639.1(a). Congress tailored the provisions of the WARN Act to effectuate those purposes. It mandated a minimum of 60 days' advance notice to enable dislocated employees to adjust their finances to the impending job loss and afford them an early opportunity to begin a

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[12] In *Reed*, this Court held that the Section 10(b) limitations period should not be applied to claims under Title I of the LMRDA even if it were assumed that the alleged Title I violations would also constitute unfair labor practices and breaches of the duty of fair representation. 488 U.S. at 333 n.7. The Court explained that any such "overlap * * * would not be attributable to similar federal policies underlying each of these areas of protection, for the policies behind [the relevant prohibitions] are quite different." *Ibid.*

job search. See S. Rep. No. 62, *supra*, at 9, 10-11. In addition, Congress mandated that employers simultaneously give notice to designated local and state officials to enable them to provide job counseling, evaluation, and training services at the worksite before employees have dispersed; the statutory goal is to speed the reintegration of dislocated employees into the work force, while reducing the broader social costs of unemployment insurance, welfare services, and a diminished local economy. *Id.* at 5, 10-12. The purpose of the NLRA's notice-of-plant-closing requirement, by contrast, is to facilitate collective bargaining between the employer and the union regarding the effects of the plant closing.[13] Because "[t]he purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss for both the workers and the community in which they live," *United Paperworkers*, 999 F.2d at 54, application of the Section 10(b) limitations period is inappropriate.[14]

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[13] In a recent decision, the NLRB similarly emphasized the distinction between WARN Act and NLRA rights. The Board ruled that payments required by the WARN Act may not be credited against payments required to remedy a violation of Section 8(a)(5) of the NLRA. It noted that "WARN payments remedy the Respondent's violation of its obligations to give advance notice of its decision to cease operations. The [NLRA] payments remedy the Respondent's violation of its obligations to allow for meaningful bargaining over the effects of its decision to cease operations." *Times Herald Printing Co.*, No. 16-CA-15433, 1994 NLRB LEXIS 972, at *12 (NLRB Nov. 30, 1994).

[14] Petitioner Crown Cork relies (CC Br. 15-17) upon the similarities between the WARN Act's precursors and the NLRA requirement to engage in collective bargaining over the effects of plant closings and layoffs. Petitioner acknowledges, however, that the predecessor bills "would have required employers not only to notify but also to consult with employees or their exclusive

C. The Practicalities Of Litigation Weigh Against Application Of The NLRA's Limitations Period To WARN Act Claims

The practicalities of litigation also militate against application of Section 10(b)'s limitations period to WARN Act claims. The NLRA's six-month limitations period would create significant problems in the litigation of such claims, thwarting the remedial purpose of the Act. On the other hand, application of state limitations periods should present no unusual problems for WARN Act litigants.

In determining which statute of limitations to apply, this Court has considered whether the limitations period affords sufficient time to vindicate effectively the right protected, particularly when the occurrence of the violation may be difficult to detect and the assistance of counsel will be needed to frame and file a suit. See, *e.g.*, *Agency Holding*, 483 U.S. at 154 ("unduly short state statutes of limitations * * * thwart the legislative purpose of creating an effective remedy"); *Reed*, 488 U.S. at 327 (selecting personal injury statute that generally affords a one-year limitations period rather than Section 10(b)); *DelCostello*, 462 U.S. at 165-166 (rejecting 90-day state limit in favor of Section 10(b)'s six-month limit where unsophisticated employee will need to evaluate union's representation and retain counsel); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 368-369 (1977); *Hoosier Cardinal*, 383 U.S. at 707 n.9; *Campbell* v. *Haverhill*, 155 U.S. 610, 615 (1895).

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representative before closing a plant." *Id.* at 16. In our view, the elimination of consultation requirements from the WARN Act as passed reinforces the inference that the notice required by the Act serves a purpose different from that served by the notice required by the NLRA. Under the WARN Act, the opportunity to negotiate with the employer is simply an incident of the notice afforded, not its primary purpose. See pages 20-21, *supra*.

Section 10(b)'s six-month limitations period is too short to vindicate WARN Act rights effectively because a violation of the WARN Act may often be difficult to ascertain. Determining whether a "plant closing" has occurred requires knowledge of the number of original employees and the number of part-time employees as defined by their hours of work. 29 U.S.C. 2101(a)(1), (2) and (8). Identifying a "mass layoff" requires knowledge of the number and percentage of employees laid off over any 30-day or 90-day period, taking into account employees who have been offered a transfer. 29 U.S.C. 2101(a)(3), 2101(b)(2), 2102(d). Assessing the merit of a WARN Act claim also requires potential litigants to determine whether any of the exemptions from and reductions in the Act's 60-day notice period, see 29 U.S.C. 2102(b), 2103, are applicable to their cases. Even assuming that unions could acquire and evaluate the information necessary to substantiate a violation of the Act, unrepresented claimants will frequently be unable to do so. Finally, a WARN Act claimant who suspects a violation will need to retain an attorney to evaluate the case and file a complaint in federal district court, subject to the strictures of Fed. R. Civ. P. 11(b)(3).[15] The ur-

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[15] As the Second Circuit has recognized, see *United Paperworkers*, 999 F.2d at 55, the requirement that a WARN Act claim be filed in federal district court weighs against the application of Section 10(b)'s six-month limitations period. Under the NLRA, the claimant's duty is limited to the filing of a charge with the NLRB, which determines whether a complaint should be issued and bears responsibility for prosecuting the case. *Ibid.* Thus, "[t]he burden on [NLRA] complainants in pursuing a claim is minimal, justifying the short statute of limitations." *Ibid.* The statutes cited by petitioners (NS Br. 28; CC Br. 27-28) for the proposition that federal employment laws typically contain short limitations periods similarly provide for enforcement by

gency of finding a new job, and the participation in the very services for dislocated workers that the Act promotes, see 29 U.S.C. 2102(a)(2) (mandating notice to state dislocated workers unit and local government), may distract aggrieved employees from immediate pursuit of a possible WARN Act claim. The six-month limitations period of Section 10(b), suited to the filing of an administrative charge with the NLRB, often will not permit the effective exercise of WARN Act rights in a judicial forum.

Petitioners also contend that a short limitations period is necessary in order (1) to further the WARN Act's purpose to provide prompt assistance to displaced workers (NS Br. 30-31; CC Br. 25-26), and (2) to protect employers from the burden of litigating stale claims (NS Br. 31-32; CC Br. 26-27). As to the former point: The WARN Act requires that *notice* of an impending plant closing or mass layoff be provided in a timely fashion in order to ensure prompt assistance to displaced workers; effectuation of that purpose does not depend on adoption of the Section 10(b) limitations period for the filing of a suit after the closing or layoff has already occurred.

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administrative bodies. By contrast, federal labor statutes that require the commencement of actions by the filing of a complaint in court typically provide longer limitations periods. See, *e.g.*, Portal-to-Portal Act of 1947, 29 U.S.C. 255(a) (two-year limitations period, or three years for willful violation, for Fair Labor Standards Act of 1938, Walsh-Healey Act, or Bacon-Davis Act); Employee Retirement Income Security Act of 1974, 29 U.S.C. 1113 (for breach of fiduciary duty, suit may be filed within six years after violation or three years after actual knowledge of the breach); Employee Polygraph Protection Act of 1988, 29 U.S.C. 2005(c)(2) (three-year limitations period); Family and Medical Leave Act of 1993, 29 U.S.C. 2617(c)(1)-(2) (Supp. V 1993) (two-year limitations period or three years for willful violation).

Moreover, adoption of a longer limitations period drawn from state law will not prevent employees or their representatives from filing suit within six months, and it is bizarre in any event to suggest that adoption of the shorter Section 10(b) period will further the interests of potential plaintiffs. As to the latter: Concern for the possibility of stale claims could serve to rebut the presumption in favor of state-law borrowing only if the likelihood that relevant evidence will become unavailable were *especially* great in the WARN Act context. In fact, quite the contrary is true. Because resolution of a WARN Act suit will generally turn on documentary evidence rather than on testimony based upon personal recollection, accurate disposition of litigation brought under the Act is particularly *un*likely to be impaired by the passage of time.[16]

Finally, application of state limitations periods to WARN Act claims creates no extraordinary risk of forum shopping. First, it is unclear whether a federal court would borrow the statute of limitations from the law of the forum State or that of the State in which the violation occurred. Compare NS Pet. App. 14a n.4 and *Halkias* v. *General Dynamics Corp.*, 31 F.3d 224, 236-237 (1994) (suggesting forum State), reh'g en banc granted, Nos. 93-1664, 93-1680 & 93-8204 (5th Cir. Sept. 22, 1994) with *United Paperworkers*, 999 F.2d at 56 & n.9 and *Halkias*, 31 F.3d at 247 (Wisdom, J., dissenting)

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[16] As petitioner North Star acknowledges (NS Br. 32 n.15), federal law requires the preservation of employment records for a three-year period. See 29 C.F.R. 516.5; 29 C.F.R. 1627.3(a). Of course, nothing prevents a prudent employer from maintaining such records for a longer period. Maintenance of the evidence needed to defend against a WARN Act suit is thus entirely within a potential defendant's control.

(suggesting State of violation).[17] If the statute of limitations is drawn from the law of the State of violation, of course, then there is no advantage to forum shopping. Even if the limitations period of the forum State applies, venue options are not unusually expansive under the WARN Act.[18] Such claims are not inherently multistate in nature; there will usually be only a single site of violation, and thus no choices available in that regard. Also, the option of suing where the employer transacts business is actually narrower than the generally applicable venue provisions in 28 U.S.C. 1391(c), which permits suit against a corporation "in any judicial district in which it is subject to personal jurisdiction." See D. Siegel, *Commentary on 1988 and 1990 Revisions of Section 1391*, 28 U.S.C.A. 1391, at 17-19 (current venue statute permits suit not only where the corporation is doing business, but also in any district in which a state long-arm statute would permit out-of-state service). Thus, forum shopping under the WARN Act would be no more problematic than under other federal statutes in which state statutes of limitations are borrowed and where venue is governed by 28 U.S.C. 1391(c). See *Halkias*, 31 F.3d at 247 (Wisdom, J., dissenting).

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[17] Even if the district court applies the law of the forum State, that law may include a state borrowing statute mandating application of the limitations period of the State where the cause of action arose. See *Cope* v. *Anderson*, 331 U.S. 461, 464-468 (1947).

[18] Suits under the WARN Act may be brought in any district in which the violation is alleged to have occurred or in which the employer transacts business. 29 U.S.C. 2104(a)(5).

D. Pennsylvania's Three-Year Limitations Period For Actions To Recover "Unpaid Wages Or Liquidated Damages" Provides The Most Appropriate State Law Analogue For WARN Act Claims

The court of appeals concluded that it "need not decide which state statute applies, since the actions would be timely under any of the possible statutes of limitations brought to the court's attention." NS Pet. App. 15a. In this Court as well, neither petitioner identifies any potentially applicable state limitations period under which the actions here would be untimely. This Court therefore may affirm the judgment of the court of appeals without deciding which state limitations period is most appropriate.

If the Court chooses to resolve the question, however, we believe that it would be appropriate to apply Pennsylvania's three-year limitations period for actions to recover "unpaid wages or liquidated damages." 43 Pa. Stat. Ann. § 260.9a(g) (1992).[19] An employee's remedy for

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[19] As noted above, see note 3, *supra*, the alleged statutory violation in *Crown Cork* occurred in Georgia, although suit was filed in Pennsylvania. Because petitioner Crown Cork has not contended that the district court should have borrowed a limitations period from Georgia law, we have confined our analysis to the law of Pennsylvania.

Petitioner North Star observes that, "[g]iven the obvious similarities in WARN litigation, there exists no suggestion in any reported case or comment that the limitations period for WARN should vary based upon the factual issues presented in each case." NS Br. 13 n.4. We agree that the appropriate characterization of a WARN Act suit does not depend upon the facts of a particular case. It does not follow, however, that WARN Act suits in States other than Pennsylvania would inevitably be governed by the state statute of limitations applicable to suits for unpaid wages. Application of a different limitations period might be warranted, either because the law of that State furnished an even more precise

a WARN Act violation is "back pay for each day of violation," 29 U.S.C. 2104(a)(1)(A), measured by reference to the employee's "regular rate," 29 U.S.C. 2104(a)(1)(A)(i) and (ii). The Act thus serves in part to compensate aggrieved employees for the wages they would have earned had the plant remained in operation for the requisite 60 days after the employer gave notice of its impending closure.

The "back pay" remedy available under the WARN Act serves substantial noncompensatory purposes as well. The Act provides that the amount of back pay for which a noncomplying employer is liable shall be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. 2104(a)(2)(A). The Conference Report makes clear that "the only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988). The absence of an offset for wages earned from another employer makes clear that Congress intended to deter and penalize violations of the Act, and to ensure that employees have the security of continuing their existing employment for each day of the 60-day notice period, rather than simply to provide aggrieved employees with the wages they would have earned had no violation occurred.[20] Those punitive and deterrent

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analogue, or because the limitations period governing wage payment suits was so short as to frustrate effective enforcement of the WARN Act.

[20] In contrast to the WARN Act remedy, back pay typically is intended to place an aggrieved employee in the same position he would have occupied but for the employer's unlawful action, and

purposes, however, also inform Pennsylvania's wage payment law, which provides for "liquidated damages [in] an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars ($500), whichever is greater," as a remedy for bad-faith refusal to pay wages owed. 43 Pa. Stat. Ann. § 260.10 (1992). Compare S. Rep. No. 62, *supra*, at 24 (WARN Act back pay remedy "is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings").[21] The three-year limitations period specified by 43 Pa. Stat. Ann. § 260.9a(g) (1992), which applies to actions "for the collection of unpaid wages or liquidated damages," therefore appears to us to furnish an appropriate analogue for an employee's WARN Act claim.

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thus ordinarily includes an offset for wages earned from another employer. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941) (NLRA); *United States* v. *Burke*, 112 S. Ct. 1867, 1873-1874 (1992) (Title VII of the Civil Rights Act of 1964).

[21] The Senate Report accompanied a predecessor version of the Act. That version included the "back pay for each day of violation" and "regular rate" formulations, but its treatment of fringe benefits differed somewhat from the Act as later passed. See S. Rep. No. 62, *supra*, at 68.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1994

NORTH STAR STEEL COMPANY,

Petitioner,

v.

CHARLES A. THOMAS, *et al.*,

Respondents.

CROWN CORK & SEAL CO., INC.

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether, in actions brought under the federal Worker Adjustment and Retraining Notification Act ("WARN"), the applicable limitations period should be drawn from § 10(b) of the National Labor Relations Act ("NLRA") rather than state law.

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. The Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[2]

The National Association of Manufacturers of the United States of America ("the NAM") is a voluntary business association of over 13,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The NAM and these councils

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of the Court.

[2] *See, e.g., McKennon v. Nashville Banner*, ___ U.S. ___, 63 U.S.L.W. 4104 (1995); *ABF Freight Systems, Inc. v. NLRB*, ___ U.S. ___, 114 S. Ct. 835 (1994); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

provide information and other educational services and publications to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them. Like the Chamber, the NAM actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts.[3]

These consolidated cases address the question of whether the statute of limitations for violations of the Worker Adjustment and Retraining Notification Act ("WARN") should be borrowed from state law or from § 10(b) of the National Labor Relations Act (the "Act" or the "NLRA"). This issue is of particular concern to Chamber and NAM members who are subject to WARN's procedures during a plant closing or layoff. On behalf of its members, the Chamber filed *amicus curiae* briefs before the U.S. Court of Appeals for the Third Circuit in these cases. Additionally, the Chamber filed briefs before the U.S. Court of Appeals for the Fifth and Sixth Circuits in cases addressing precisely this same issue. *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir., Sept. 22, 1994); *United Mine Workers of America v. Peabody Coal Company*, ___ F.3d ___, 1994 WL 590188 (6th Cir. 1994).

Both the Chamber and the NAM believe that the federal policies at stake in the WARN Act – and the practical problems state limitations periods would create

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[3] *See, e.g., St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); *R.R. Donnelley & Sons Co. v. Prevost*, 111 S. Ct. 1415 (1991).

for WARN litigants – make the NLRA limitations period profoundly more appropriate for actions brought under WARN. On behalf of the large number of their members who are subject to the notice requirement of the WARN Act, the Chamber and the NAM urge this Court to apply the six-month statute of limitations from § 10(b) of the NLRA to WARN actions.

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Third Circuit rejected application of the six-month statute of limitations from § 10(b) of the NLRA in these two consolidated cases. In *North Star Steel Co. v. Thomas,* the appellate court reversed the U.S. District Court for the Middle District of Pennsylvania for dismissing as time-barred a complaint alleging failure to give notice of a plant closing which was filed nearly 20 months after the plant closed. In *Crown Cork & Seal Co. v. United Steelworkers of America,* the appellate court affirmed the U.S. District Court for the Eastern District of Pennsylvania's denial of the company's motion for summary judgment, which argued that an action brought more than twelve months after a plant closing was time-barred.

In reaching this decision, the appellate court acknowledged that "none of the possible state laws provide perfect analogies to WARN," and "that there are some definitional overlaps" between the two federal statutes. Nevertheless, the court held that the policies underlying WARN, and the practicalities of WARN litigation

did not merit an exception to the general rule dictating state borrowing. The Third Circuit, however, declined to specify which of the four Pennsylvania limitations periods should be applied to the instant cases. On January 6, 1995, this Court granted both companies' petitions for writ of *certiorari*.

ARGUMENT

These cases concern a fundamental aspect of federal statutory interpretation: whether the statute of limitations period from § 10(b) of the National Labor Relations Act should be "borrowed" for actions arising under the Worker Adjustment and Retraining Notification Act. The federal courts of appeals have divided on this issue.[4] The Chamber and the NAM urge this court to reaffirm the standard it set forth in *DelCostello v. International Brotherhood of Teamsters, et. al.*, 462 U.S. 151 (1983), which

[4] As noted in the petitions for writ of *certiorari*, the Fifth and Sixth Circuits have applied the six-month limitations period from § 10(b) of the NLRA to actions brought under WARN. *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos 93-1664, 93-1680, 93-8204, WL 520351 (5th Cir. Sept. 22, 1994); *United Mine Workers of America v. Peabody Coal Company*, 38 F.3d 850 (6th Cir. 1994). On the other hand, the Second and Third Circuits have applied state limitations periods to WARN actions. *United Paperworkers International Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993); *United Steelworkers of America v. Crown Cork & Seal*, 32 F.3d 53 (3d Cir. 1994), *cert. granted*, 63 U.S.L.W. 3514 (U.S. Jan. 6, 1995).

supports application of a federal limitations period when the federal period provides a "closer analogy" than the state limitations period *and* the practicalities of litigation make the federal rule significantly more appropriate than the state limitations period.

Application of the *DelCostello* framework to the instant case supports adoption of the NLRA limitations period for actions brought under WARN. Since both statutes address essential facets of federal labor law, WARN's policies are best effectuated by application of § 10(b)'s six-month limitations period. Furthermore, the practicalities of WARN litigation, in terms of preventing forum shopping and facilitating the efficient resolution of WARN actions, makes the six-month period vastly more appropriate than a state limitations period.

I. THIS COURT'S RULING IN *DELCOSTELLO v. TEAMSTERS* SUPPORTS APPLICATION OF THE FEDERAL LIMITATIONS PERIOD.

A. The Six-Month Statute of Limitations Period From § 10(b) of the NLRA Provides a "Closer Fit" Than the State Limitations Period.

When Congress fails to provide a statute of limitations for a federal cause of action, courts generally "borrow" or "absorb" the limitation period for the most analogous state cause of action. *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. ___, 115 L. Ed. 2d 321 (1991). This Court, however, has recognized a significant exception to the rule directing "state borrowing." In

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 172 (1983), the Court held that

> when a rule from elsewhere in federal law clearly provides a **closer analogy** than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, **we have not hesitated to turn away from state law.**

(*emphasis added*). *See also Lampf,* 115 L. Ed. 2d at 331-32 (quoting *DelCostello*).

In *DelCostello,* the Court ruled that an employee's action against an employer for breach of a collective bargaining agreement and against the union for breach of the duty of fair representation was governed by § 10(b)'s six-month limitations period. According to the Court, this type of "hybrid" action was more similar to an action for an unfair labor practice than a breach of contract claim. In reaching this conclusion, the Court made three determinations: (1) that the NLRA provided a closer analogy to the federal claim than the state limitations period; (2) that the federal policies at stake favored application of a uniform, federal statute of limitations; and (3) that the practicalities of litigation favored the application of a uniform federal limitations period. *DelCostello* at 171-72.

Federal limitations periods have been borrowed by this Court using the *DelCostello* framework in a number of circumstances. In *Agency Holding Corporation v. Malley-Duff & Associates,* 483 U.S. 143 (1987), the limitations period from the Clayton Act for civil enforcement actions was borrowed for actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Based on the standard set out in *DelCostello*, the Court determined that the Clayton Act – rather than a state cause of action – offered the closest analogy to civil RICO actions.[5] 483 U.S. at 150. Similarly, in *West v. Conrail*, 481 U.S. 35 (1987), the Court applied the limitations period from § 10(b) of the NLRA to actions brought under the Railway Labor Act.

Actions brought under WARN also fall within the category of actions better governed by a federal limitations period. As explained below, the NLRA provides a closer analogy to WARN than do the state-law causes of action urged by the Respondents. Moreover, significant practical difficulties will result for both employers and employees unless the § 10(b) limitations period is adopted.

1. Important Substantive Reasons Exist for Applying the NLRA's Statute of Limitations Period to WARN Cases.

The Chamber and the NAM contend that the six-month statute of limitations from § 10(b) of the NLRA must govern causes of action brought under WARN because both statutes govern fundamental aspects of federal labor policy. As stated in *DelCostello*, courts should not borrow the limitations period applicable to state-law claims when the federal-law cause of action provides a

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[5] The Court in *Agency Holding* added an initial inquiry to the *DelCostello* framework, which asks whether a uniform statute of limitations should be established for the federal cause of action "to avoid intolerable 'uncertainty and time-consuming litigation.' " *Agency Holding* at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)).

closer analogy to the cause of action at issue.[6] 462 U.S. at 172. Here, WARN and the NLRA have meaningful substantive similarities that support application of the federal limitations period to WARN actions.[7]

WARN can clearly be analogized to the NLRA. *See e.g., United Mine Workers of America v. Peabody Coal Co.*, 38 F.3d 850, 856 (6th Cir. 1994) ("there can be no doubt that Section 10(b) provides a closer analogy than the state law advocated here, which in essence provides no analogy"). Congress was cognizant that WARN regulated aspects of federal labor policy, and that it would have a dramatic effect on the NLRA.[8] The sponsors of WARN went to

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[6] According to this Court's teachings in *DelCostello*, all that is needed is a "close fit" – not a "perfect fit" – in order to justify favoring a federal limitations period over a state law limitations period.

[7] The Chamber and the NAM contend that the Third Circuit erred in finding that the NLRA is only concerned with the "process" of collective bargaining. The court's distinction between "process" and "substance" ignores the fact that one of the purposes central to the NLRA is the protection of concerted activity by *all* employees, regardless of whether they are represented by a union. 29 U.S.C. § 157. *See also* 1 *Developing Labor Law* 137 (P. Hardin *et al.* eds, 3d ed. 1992) (NLRA "broadly protects 'concerted' activity, not merely union activity").

[8] Congress often recognizes that a new law regulating an aspect of the employer-employee relationship will have an impact on the NLRA. In these situations, Congress either makes a general reference to the NLRA *or* – as in the case of WARN – specifically incorporates definitions from the NLRA itself. *See* Labor Management Reporting and Disclosure Act, 29 U.S.C. § 402(j)(1) (defining a labor organization as "the certified representative of employees under the provisions of the National Labor Relations Act"); Age Discrimination in Employment Act, 29 U.S.C. § 630(e)(1) (adopting the definition

special efforts to guarantee that these two federal labor statutes were compatible. For example, Senator Hatch, ranking minority member of the Senate labor committee, stated that WARN "constitutes a major change in the National Labor Relations Act." 134 Cong. Rec. 15923, 15924 (June 24, 1988). With this concern in mind, Congress specifically incorporated the NLRA into WARN by adding the following provision:

> The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act . . .

29 U.S.C. § 2108.

Moreover, WARN regulations issued by the Department of Labor (20 C.F.R. part 639) expressly incorporate or reference provisions of the NLRA. *See* § 639.1(g) ("Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN. . . . "); § 639.3(d) (incorporating the NLRA's definition of "exclusive representative"); § 639.6 (requiring notice be given to exclusive representatives); and § 639.7 (detailing the information that must be provided to the employees' exclusive representative). In addition to the incorporation of these specific terms, the Department has explicitly suggested that courts interpret WARN in accordance with NLRA precedent.[9] 54 Fed. Reg. 106041-42 (April 20, 1989).

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of labor organization from the NLRA); and Civil Rights Act of 1964, 42 U.S.C. § 2000e(e)(1) (incorporating the definition of labor organization from the NLRA).

[9] *See e.g. Carpenters District Council of New Orleans & Vicinity v. Dillard Department Stores, Inc.* 15 F.3d 1275, 1283 (5th

Furthermore, WARN and the NLRA are the only two federal statutes that provide protections to employees who are the subject of mass layoffs or plant closings. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (setting forth a standard for determining when negotiation over the effects of a plant closing or layoff is a mandatory subject of bargaining under the NLRA); *Dubuque Packing Co., Inc.*, 303 N.L.R.B. No. 66 (1991), *review granted in part, enforcement granted in part, remanded*, 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed*, 114 S. Ct. 2157 (1994) (affirming the NLRB's new standard for determining when an employer must bargain with a union over the effects of a plant closing or layoff). As the Fifth Circuit aptly observed, "[t]he NLRA is more than just analogous to WARN; in fact, WARN may be thought of as an outgrowth of the NLRA, because § 8(a)(1) and 8(a)(5) of the NLRA . . . have [both] been interpreted to require an employer to notify a union of its decision to close a plant." *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204 WL 520351 (5th Cir., Sept. 22, 1994) at 232.

By contrast, WARN has no relationship to the state common law limitations periods. In the instant case, the

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Cir. 1994), *cert.* denied, 63 U.S.L.W. 3559, 3562 (Jan 23, 1995) (citing National Labor Relations Board principles regarding back pay); *Damron v. Rob Fork Mining Corp.*, 945 F.2d 121, 124 (6th Cir. 1991) (analyzing WARN's "reasonable expectation of recall" language according to NLRB guidelines); and *Bradley v. Sequoyah Fuels Corp.*, 847 F.Supp 863, 868 (E.D. Okla. 1994) (applying NLRB guidelines regarding "temporary layoff" and "reasonable expectation of recall" to WARN actions).

Third Circuit sanctioned the use of four alternative Pennsylvania limitations periods, each of which bears no relation to federal labor relations or plant closings. Clearly, the Third Circuit was incorrect in holding that state law provides a closer substantive similarity to WARN.

2. Important Practical Reasons Exist for Applying the § 10(b) Limitations Period to WARN Actions.

The six-month period contained in § 10(b) of the NLRA must be "borrowed" for actions brought under the WARN to avoid creating practical problems for WARN litigants. The purpose of WARN is to provide uniform federal regulation of plant closings and mass layoffs. Unless a uniform federal statute of limitations is applied in WARN actions, this purpose will be completely undermined.

Application of state limitations periods to WARN actions will significantly increase forum shopping by potential plaintiffs, and will serve to complicate all aspects of WARN litigation. WARN contains a broad venue provision allowing suit in, among other places, any district in which the employer **transacts business**. 29 U.S.C. § 2904(a)(5). The practical consequence of combining this expansive venue provision with widely divergent state statutes of limitation **would be to drive WARN suits into jurisdictions having little or no rational connection to the parties or to the WARN events**. Jurisdictions – in which the only connection between the court and the suit is that the employer transacted business in that venue – would become vehicles for litigating claims

time-barred by the state in which the WARN events occurred and the parties reside.

The effort to cure a default in one state by shopping for a longer statute of limitations in another would breed expensive and complex battles over choice of law questions. *See Peabody Coal,* 38 F.3d at 855 (describing the choice of law problems as "potentially daunting"). A court district sitting in a jurisdiction other than where the WARN claim arose first would have to determine whether or not it should adopt the forum state's choice of law principles as surrogate for federal common law. *See Halkias,* 31 F.3d at 236-37 (noting that choice of law principles in federal question cases are derived from federal common law). Once the court decides to do so, it must then determine whether the forum state views statutes of limitations as substantive or procedural. *See id.* If the forum views limitations periods as procedural, only then would the court proceed to determine the merits of the WARN issue, using the forum state's limitations period. All these determinations would likely cause time-consuming litigation, thereby wasting substantial amounts of judicial resources and running up unnecessary attorney's fees for all parties.

The delay and costs inherent in permitting parties to file suit in states that have no relationship to the dispute other than a longer limitations period would be particularly destructive to WARN. Circumstances in which plants are closed and workers are laid off in mass are not reasonably addressed in litigation years after the fact. Small businesses, in particular, would be severely impacted by delay in litigating WARN suits. As a practical matter, small businesses do not have the resources to

maintain personnel records for any length of time. Key witnesses are likely to be unavailable at the time a WARN action ensues. In fact, WARN typically applies to a small business only during its closing. It is unreasonable to assume that a WARN claim in that context – one asserted against a business that no longer exists after its plant is closed – can be maintained years after the fact.

Additionally, allowing parties to "forum shop" will have a detrimental impact on the judiciary. As in the instant case, plaintiffs in WARN actions will advocate adoption of the most advantageous state limitations period, and the courts will be forced to litigate the limitations dispute before reaching the merits of the WARN dispute. This not only wastes critical judicial resources, but also delays compensation to plaintiffs for what may later be judged to be a meritorious WARN claim. Katherine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations By Default*, 72 Neb. L. Rev. 454, 473 (1993).[10]

Borrowing state limitations periods will only further complicate complex multi-state litigation. The DOL's regulations expressly recognize that WARN claims may involve multiple sites under common ownership or control.[11] For a Chamber or NAM member, a "downsizing"

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[10] This case illustrates the problem lack of uniformity creates. Both North Star Steel Company and Crown Cork & Seal initiated their plant closings in 1991. Approximately four years later, the merits of these claims have not been reached because of litigation over the limitations issue.

[11] The regulations point to the case of a "major automaker which has dozens of automobile plants throughout the country." 20 C.F.R. § 639.3(a)(4).

may involve closing individual divisions located in several states. In such cases involving multiple claims, "[t]rying to determine what state time-bars apply further complicates an already complex action and may impair settlement negotiations." *Id.* at 474. Adoption of the NLRA's uniform limitations period would alleviate these concerns.

Since WARN emphasizes the speedy resolution of disputes, the six-month limitations period from § 10(b) is by far more appropriate than any state limitations period of greater length. The assumption that WARN's enforcement will be fostered by lengthy state limitations periods is simply misconceived. The purpose of WARN is to provide advance notice of imminent unemployment so that employees can pursue other employment options. To further this purpose, Congress limited the remedies for a WARN violation to the sixty days' pay the employee would have received had the proper notice been given. The variety of compensatory and punitive remedies that prompt individuals to sue years after a plant closes are just not available in WARN actions. Thus, the six-month limitations period is consistent with Congress' intent to provide quick resolution of WARN disputes.[12]

Finally, the six-month limitations period from § 10(b) provides an effective balance between an employee's need to commence legal actions and an employer's need

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[12] Consistent with this emphasis on efficient resolution of WARN disputes, Congress does not impose civil sanctions on employers who make complete payments within three weeks of the WARN event to employees affected by a plant closing or layoff. 29 U.S.C. § 2104(a)(4).

to know its contingent liabilities in planning for the future. The relatively short limitations period has worked effectively under the NLRA for approximately forty years. In addition, short limitations periods have been adopted by Congress in a number of other federal labor statutes. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) ("A charge under this section shall be filed within 180 days after the alleged unlawful employment practice . . . "); and Civil Service Reform Act of 1978, 5 U.S.C. § 7118(a)(4)(A) (" . . . no complaint shall be issued based on any alleged unfair labor practice which occurred more that 6 months before . . . "). Thus, application of the six-month period from § 10(b) would be consistent with Congress' past actions in the employment area.

CONCLUSION

For the foregoing reasons, the Chamber and the NAM urge the Court to apply the six-month statute of limitations from § 10(b) of the NLRA to actions brought under WARN.

Respectfully submitted,

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